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January 3, 1973

Honorable Quentin L. Kopp  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Ordinance Regulating Advertisement  
of Non-Refund Performances

Dear Supervisor Kopp:

In response to your inquiry of December 1, 1972, it is my opinion that the Board of Supervisors has the power to regulate advertisement of shows and other events where all ticket sales are final and no refunds are made available to purchasers. Such regulation requiring that all advertisements include a statement of a non-refund practice is within the powers of the Board to safeguard the general welfare of the inhabitants of the City and County of San Francisco.

The Legislature has not specifically regulated the area of ticket advertisement. Instead, in Business and Professions Code Section 17500, it has broadly prohibited statements in advertising which might tend to defraud or mislead. However, it has yet to be decided whether Section 17500 reaches failure to disclose information, and it is such disclosure that this ordinance seeks to promote. Therefore, there is no conflict between the proposed advertisement ordinance and general law, nor has the state occupied this field. In addition, no existing ordinance of the City and County of San Francisco would provide similar protection or conflict with this advertisement regulation as drafted.

In view of the fact, then, that this ordinance would further the public welfare and not conflict with existing statute or ordinance, its passage is a proper exercise of the powers of the Board of Supervisors.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



January 4, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Power of Board of Supervisors to  
Enact Ordinance Governed by Charter

Dear Mr. Dolan:

You have requested my opinion whether the Board of Supervisors can accomplish by enactment of an ordinance the changes contemplated by a proposed Charter amendment, Proposition "Q", which was rejected by the electorate at the election held on November 8, 1966.

Briefly, Proposition "Q" would have amended Sections 168.1.1 and 171.1.1 of the Charter of 1932 (now Sections 8.545 and 8.569) to include in the definitions of "member of the police department" and "member of the fire department," for purposes of the Retirement System, members of said departments who occupy a position in another department or office of the City and County pursuant to an indefinite leave of absence from the Police or Fire Department to accept a noncivil service position or promotion to correlated work in such other office or department. As will be explained, the changes contemplated by Proposition "Q" can be effectuated only by a Charter amendment. They cannot be accomplished by an ordinance of the Board of Supervisors.

As you know, the Charter establishes three separate benefit programs under the Retirement System, to wit: Police, Fire and "Miscellaneous." The benefits under the Police and Fire programs are available only to "members" of those respective Departments as defined in the Charter. (See Sections 8.545 and 8.569.) In general, "members" are those persons in the uniformed forces of the Police and Fire Departments. The benefits under the "Miscellaneous" program are applicable to all members of the Retirement System other than those covered by either the Police or Fire program. (Charter, Section 8.509(A).)





Mr. Robert J. Dolan

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In recognition of the hazardous nature of the duties performed by the uniformed forces of the Police and Fire Departments, the benefits available to such persons are more extensive than those provided to "miscellaneous" members. If a person who is covered under the Police or Fire program accepts a position outside the uniformed forces of the Police or Fire Department, he would thereby normally become a "miscellaneous" member of the Retirement System and would cease to be entitled to the benefits provided under the Police or Fire program. Such a person would thereafter be entitled only to the lesser benefits provided under the "Miscellaneous" program. It was the apparent purpose of Proposition "Q" to permit persons entitled to coverage under the Police or Fire program to accept positions in other departments without losing such coverage.

As indicated, the term "member" of the Police or Fire Department for retirement purposes is defined in the Charter. The Board of Supervisors has the power to legislate upon all "municipal affairs" except those governed by express provision in the Charter, since the Charter is an instrument of limitations and restrictions upon the power of the Board of Supervisors to legislate. (West Coast Advertising Company v. City and County of San Francisco, 14 C.2d 516.) As the Charter specifically defines the persons entitled to the benefits of the Police, Fire and "Miscellaneous" programs, the Board of Supervisors is precluded from in any way altering such definitions by ordinance.

You are advised accordingly.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



January 5, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Municipal Legislation Prohibiting  
Lending Institutions from Impounding  
Real Property Taxes Without the  
Consent of the Borrower

Dear Mr. Dolan:

This opinion is in response to your letter with relation to impound accounts.

As I understand the problem, lending institutions frequently require in the terms of a loan a provision that the periodic payments by the borrower shall also include an amount covering real property taxes. This loan requirement is sometimes imposed against the will of the borrower. Also the aggregate amount collected over a year may equal the annual property taxes, indicating that the borrower does not receive interest on the amount so collected.

Your letter inquires into the legality of municipal legislation prohibiting such impound accounts. Due to the complexity in the field of regulation of loans and due to existing state legislation in relation thereto, the area appears to be a matter of statewide concern and municipal regulation would be preempted.

In addition to comprehensive legislation regulating the practices of lending institutions enacted by the Legislature, certain regulations have been adopted by vote of the people. Thus, Article 20, Section 22 of the California Constitution approved in 1934 creates a maximum interest rate of 10 per cent per annum on loans. Savings and loan associations, industrial loan companies, pawnbrokers, personal property brokers, and state chartered and federally chartered banks are specifically exempted from this provision. However, this provision in no way derogates



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from the Legislature's power to regulate lending institutions. The language of Article 20, Section 22 expressly states:

"The Legislature may from time to time prescribe the maximum rate per annum of, or provide for the supervision, or the filing of a schedule of, or in any manner fix, regulate or limit, the fees, bonus, commissions, discounts or other compensation which all or any of the said exempted classes of persons may charge or receive from a borrower in connection with any loan or forbearance of any money . . ."

The Usury Law, an initiative measure approved by the electorate in 1918, is set out in the Civil Code Sections 1916-1 to 1916-5, and creates a maximum interest rate of 12 per cent per annum.

In view of the conflicting maximum rates, the constitutional provisions prevail and the maximum allowable rate today is 10 per cent per annum. Also, those lending institutions specifically exempted under Article 20, Section 22 are exempted from the restrictions of the Usury Law. West Pico Furniture Co. v. Pacific Finance Loans, 2 C.3d 594, 614 (1970).

Banks are regulated by the provisions of Division 1 of the California Financial Code and applicable federal law. There are different classifications of banks and different laws regulate the loan policies of each type. Loans by commercial banks are regulated by Section 1200 et seq., nondepartmental banks are regulated by Section 1300 et seq., and savings banks are regulated by Section 1400 et seq.

The Superintendent of Banks derives authority from Section 200 et seq. to direct the state banking department, execute laws relating to banks and adopt reasonable rules and regulations necessary or advisable in performing his duties.

A similar regulatory scheme under Division 2 of the Financial Code with relation to Savings and Loan Associations empowers the Savings and Loan Commissioner to enforce the code provisions and to adopt rules and regulations necessary thereto.

A comprehensive system delineating loan policies and limitations is set forth in Section 7150 et seq. Federally insured loans are governed by Section 7200 et seq. Federally created associations are also subject to applicable federal law.





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The lending practices of industrial loan companies are regulated by Division 7 of the Financial Code. Section 18400 grants to these corporations the power to loan and Section 18600 et seq. delineates industrial loan regulations. Section 18655 specifically limits charges and interest on loans; however, Section 18649 exempts from these provisions loans of \$10,000.00 or more made with no intent to evade the provisions of this Code.

Division 9 of the Financial Code establishes regulations for loans by personal property brokers. Section 22450 et seq. creates loan regulations and Section 22451 establishes maximum charges. However, Section 22053 exempts from these loan regulations loans of \$10,000.00 or more.

Sections 10240 and 10241 of the Business and Professions Code require that a real estate licensee, who negotiates a loan on real property, deliver to the borrower a statement itemizing the costs, expenses, principal, interest and other obligations incurred by the borrower. Section 10242 places a limit upon such expenses, charges and interest. However, Section 10245 exempts loans of \$12,000.00 or more secured directly or collaterally by a first deed of trust and loans of \$6,000.00 or more secured directly or collaterally by any lien junior thereto.

The only legislation specifically regulating impound accounts appears in Sections 2954 and 2955 of the Civil Code. Section 2954 states that where impound accounts are utilized for the payment of taxes, insurance or any other items, the borrower is entitled to receive an annual accounting free of charge, and additional, more frequent accountings may be received for prescribed, nominal fees. Section 2955 provides that money in an impound account shall be retained in California and, if invested, only with residents or businesses in California.

The foregoing legislative provisions indicate the complexity of the field of loans and the extent to which the Legislature and the state electorate has chosen to regulate. Concerning impound accounts, the Legislature recognizes such accounts and has chosen not to prohibit them nor regulate them except as previously noted.

Three bills directed to this problem have been proposed in the California Senate:

1. SB 332, introduced by Senator Holmdahl February 23, 1972 and amended May 23, 1972, would require that interest be paid on such funds.
2. SB 838, introduced by Senator Dymally March 15, 1972, would require that interest be





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paid where the loan is on residential property.

3. SB 899, introduced by Senator Short March 15, 1972, would prohibit after January 1, 1973 impound accounts in connection with loans on single-family owner-occupied dwellings.

I have delayed responding to your request so that I could inform you as to any legislative action taken on these bills. However, the 1972 Legislature adjourned with the three bills still residing in Committee.

The language of Article 20, Section 22, the cases interpreting this provision and the inherent power retained by the Legislature show that the regulation of lending practices and specifically the regulation of impound accounts is completely within the province of the Legislature. The regulation of loans by lending institutions is a matter of statewide concern and the constitutional, legislative and judicial declarations indicate the field is preempted by state law.

Therefore, I conclude that the regulation of impound accounts can only be undertaken by the Legislature, and the City and County of San Francisco is prohibited according to the principles of preemption.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



January 8, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: File No. 529-68; Application of Civil  
Rights Act of 1964 to Death Benefits  
Under Retirement System

Dear Mr. Dolan:

At its meeting held on December 5, 1972, the Legislative and Personnel Committee orally requested the opinion of this office as to whether the Civil Rights Act of 1964, as amended, requires that the Board of Supervisors enact the ordinance which is the subject of the above file.

The subject ordinance would add Section 16.80-4 to the Administrative Code to provide that, upon the death of a retired female employee, her surviving husband shall be entitled to an allowance equal to one-half of his wife's unmodified retirement allowance, subject to certain conditions and limitations. As you know, there are provisions in the Administrative Code which provide that the surviving wife of a retired male employee shall, upon his death, receive an allowance equal to one-half of his unmodified retirement allowance. Thus, it is the purpose and intent of the subject ordinance to provide for surviving husbands of retired female employees the same type of allowance as is presently available for surviving wives of retired male employees.

Prior to its amendment in 1972, Title VII of the Civil Rights Act of 1964 was not applicable to State and local governments. However, as amended by the Equal Employment Opportunity Act of 1972 (P.L. 92-261), the reach of the law has now been expanded to include State and local governments, governmental agencies and political subdivisions. (42 U.S.C.A. 2000e(a).) Consequently, the City and County of San Francisco, as a political subdivision of the State of California, is subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, and is thereby prohibited from engaging in unlawful employment practices. (42 U.S.C.A. 2000e-2(a).)



The question involved in this request for opinion is whether the City and County's failure to provide certain death benefits to surviving husbands of retired female employees constitutes an unlawful employment practice prohibited by Title VII, because such death benefits are provided for the surviving wives of retired male employees.

Pursuant to its authority under the law, the Equal Employment Opportunity Commission has promulgated "Guidelines on Discrimination Because of Sex." (Code of Federal Regulations, Title 29, Chapter XIV, sections 1604, et seq.) These Guidelines represent the Commission's interpretation of the effect of the Civil Rights Act of 1964, as amended, upon the providing of benefits to employees.

Section 1604.9(a) of the Guidelines defines the term "fringe benefits," as used in the Guidelines, as including "retirement benefits." Section 1604.9(b) provides:

"It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits."

Section 1604.9(d) provides:

"It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; . . ."

Section 1609.4(f) provides:

"It shall be an unlawful employment practice for an employer to have a pension or retirement plan . . . which differentiates in benefits on the basis of sex. . ."

My research has failed to disclose any court decision on the precise point involved herein. However, in view of the portions of the Guidelines quoted above, it appears that the failure of the City and County to provide the same death benefits for surviving husbands of retired female employees as it does for surviving wives of retired male employees could be found to be an unlawful employment practice prohibited by the Civil Rights Act of 1964, as amended.

You are advised accordingly.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



January 9, 1973

Mr. Ronald H. Born, General Manager  
Department of Social Services  
585 Bush Street  
San Francisco, California 94108

Subject: Notice, Hearing and Appeal Procedures  
for Adoptions and Foster Care Programs

Dear Mr. Born:

This is in response to your letter concerning the State Department of Social Welfare Directive - Notice, Hearing and Appeal Procedure for Adoptions and Foster Care Programs. Your concern about the legality of the application of this procedure to voluntary placements is well taken. This letter will present legal arguments and authorities with regard to this proposal for your reference to the State Department of Social Welfare should you so choose.

A. The Proposal

According to this directive, your agency must give ten days' written notice of intent to remove a child placed for foster care or adoption in a given home for more than thirty (30) days. Foster or adoptive parents opposed to the removal may request a hearing at the county welfare department level, while retaining the child. A decision upholding the removal may be appealed to the State Department of Social Welfare, while the child remains in the home and thereafter, to the State Director of the State Department of Social Welfare. The proposal correctly hints that legal action might follow.

Code of Civil Procedure Sec. 1094.5 provides a Writ of Mandate remedy for the purpose of inquiring into the validity of any final administrative order or decision made as to the result of a proceeding in which by law a hearing is required to be given. Sec. 1094.5 may be applied even though there is no statute requiring such judicial review (Rodriguez v. Superior Court, 18 C.A.3d 510, 95 CR 923, (1971).)







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Therefore, for the purpose of this letter, we can reasonably assume that if such a hearing procedure were set up, eventually Sec. 1094.5 of the Code of Civil Procedure would be applied. You can realistically conclude, therefore, that objecting foster or adoptive parents will be able to prevent removal of a child for a minimum period of two (2) years if they exhaust all remedies up to and including the Writ of Mandate procedure.

We are concerned with three (3) categories of children: voluntary placements, wherein the natural parent requests assistance and your agency conducts a foster home placement; adoptive placements, wherein a legally freed child is placed for adoption with prospective adoptive parents; and foster home placements, where foster parents attempt to adopt a foster child without qualifying as prospective adoptive parents. In each of these instances the foster or adoptive parents would be in a position, under this new procedure, to prevent the removal of the child for an extensive period of time, after the child has been placed there over thirty (30) days.

The proposal indicates that children subject to juvenile court jurisdiction are exempt from the plan. In this, at least, the proposal is on point with the law in that once the Juvenile Court has assumed jurisdiction, all placement orders emanate from the Court. The Minutes of the December 6, 1972 CAAA Meeting in Los Angeles indicates some dispute over this point. Said Minutes also indicate that State Department of Social Welfare is aware of "illegalities in the directive."

A serious problem with this directive is the breadth of the definitions. "Any interested person" may initiate these hearings, and this category includes: natural, adoptive or foster parents, applicants to be foster or adoptive parents, guardians, or any other person acting in behalf of the child. Under this definition, any person having knowledge of the child could request a hearing concerning any element of dissatisfaction with other procedures or actions (of any party) of a foster care or adoptive home placement.

The State Department of Social Welfare representative in attendance at the December 6, 1972 CAAA Meeting stated that "if an adoptive applicant is denied by the agency, the procedures do not apply." It is hard to see how the definitions contained in the proposal exclude these parties. As you know, it is a common enough occurrence that foster parents indicate an interest in adopting a foster child after that child has been freed, and the home study conducted recommends against approval of those foster parents as adoptive parents. Pursuant to Civil Code Sec. 224n, the agency is free to remove the child. It is in this instance that the initiation of the new procedure would



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prevent removal of the child from an improper home for an extensive period of time and nothing in the proposal exempts this situation.

B. Legality of Effect on Voluntary Placement

The most serious situation to be created by this proposed procedure is that which gives foster parents priority over natural parents without any legal finding of unfitness on the part of the natural parent. When a natural parent seeks help in the way of temporary child placement in a foster home, that natural parent may be giving up the right to reclaim custody of said child until the foster parents exhaust all of the proposed administrative remedies, which will be followed by legal appeals therefrom (no doubt), and only if the foster parents are unsuccessful. The natural parents will be deprived of custody without legal grounds and without a court hearing while this process is taking place.

California law is clear that the natural parents have a well defined right to the custody and control of their children. Generally, this paramount right can be lost only as the result of certain legal proceedings: a divorce or separation action with a custody order, the adoption of the child by another, the court appointment of another as legal guardian, or the assumption of dependency or wardship by a Juvenile Court. Each of the above are legal proceedings, conducted in a court of law, dependent upon a court order removing custody from the natural parent.

The current proposal would retain the foster home placement contrary to the natural parents' wishes without the required legal grounds or court action. The natural parent seeking agency help with his or her child because of temporary incapacity would be subjecting himself or herself to a long custody battle to regain the child, all because concern for the child's welfare was paramount.

The Rights of Natural Parents are Protected by California Law.

In proceedings involving the rights of parents, it will be presumed that a parent has a superior legal right to the custody of a child as against a third party.

(24 Cal.Jur.2d, Habeas Corpus Sec. 53.)

It requires a strong showing as to the unfitness of the parent or the preference of the child to overcome the parent's superior legal right to custody, and in the absence of such a showing, the superior legal right will prevail.



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Pending trial of these issues, the parent is entitled to custody.

(McGuire v. Superior Court,  
137 C.A. 272, 30 P.2d 61)

United States Supreme Court:

"It is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter."

(Prince v. Mass., 321 U.S.  
158, 64 S.Ct. 438)

California Supreme Court:

"The code sections [Civil and Probate] contemplate that the care of a minor child be awarded to a parent, if a fit and proper person, as against a stranger."

(Stewart v. Stewart, 41 C.2d  
447, 260 P.2d 44)

### The Application of Habeas Corpus

If this proposal goes into effect, and a foster parent objects to the return of the child in a voluntary placement, the foster parents, the county agency, and the state department should be ready to defend against a habeas corpus proceeding. To detain a child from natural parents without the authority of legal proceedings gives rise to this cause of action.

"Habeas corpus is the proper procedure to release an infant from any manner of illegal restraint and determine matters of custody. The writ is available as a remedy against persons having custody without authority of legal proceedings."

(24 Cal.Jur.2d, Habeas  
Corpus 52)





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"A child's parents are ordinarily its natural and proper custodians, so that whenever a child is detained by another person or authority a parent may have a remedy by habeas corpus upon the hearing of which the court may properly award the custody of the child to the petitioning parent."

(In re Gille, 65 C.A. 617,  
224 P.784)

(In re Craze, 145 C.A.2d 492,  
302 P.2d 595.)

#### C. Comparison with State Department of Social Welfare Regulations

As an agency licensed by the State Department of Social Welfare, you are required to follow the directives of that department with respect to the care provided children under your supervision. Your agency is required to observe the regulations disseminated under the California-Manual-State Department of Social Welfare.

Chapter 30-300 concerns out-of-home services for children and provides guidelines for foster care placement. Section 30-303.13 requires you to provide a foster care program that will "strengthen the own parent's relationship with the child." Section 30-303.16 urges "work toward the child's return home." Section 30-309 sets out the county's responsibility to provide services aimed at "the early return of the child to his own home," Section 30-309.22. You further must serve children through assisting in the maintenance of the child's ties and relationships with parents and other family members, Section 30-311.16.

Parents are to be assisted to maintain their roles as parents to the fullest extent possible, to pursue their rights, to participate appropriately in the foster care placement, Sections 30-311.21-.25. Assistance to foster parents should include the encouragement of the maintenance of the parent-child relationship, Section 30-311.34.

It is obvious that the proposal which concerns us here is at odds with many State Department of Social Welfare directives as contained in the California Manual. The entire emphasis of the above sections is toward an eventual return home, that foster care is temporary care only. Especially in voluntary placement situations, to give the foster parents the power to thwart that return home by lengthy proceedings is contrary to these regulations and to California law.





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"No petition may be filed to adopt a child relinquished to a licensed adoption agency or a child declared free from the custody and control of either or both of his parents and referred to a licensed adoption agency for adoptive placement, except by the prospective adoptive parents with whom the child has been placed for adoption by the adoption agency. After the petition for adoption has been filed, the agency may remove the child from the prospective adoptive parents only with the approval of the court, upon motion by the agency after notice to the prospective adoptive parents, supported by an affidavit or affidavits stating the grounds on which removal is sought. If an agency refuses to consent to the adoption of a child by the person or persons with whom the agency placed the child for adoption, the superior court may nevertheless decree the adoption if it finds that the refusal to consent is not in the best interest of the child."

The agency is responsible for and entitled to the care, custody and control of the child at all times until a petition for adoption has been granted. The proposal would enable foster parents, prospective adoptive parents, unapproved adoptive parents, or any "interested person" to withhold custody from the agency, which agency is given the responsibility for same, pursuant to state law. The statute further authorizes the agency to terminate either foster or adoptive placement at its discretion unless a petition for adoption has been granted. Again, the proposal flies in the face of the statute.

Civil Code Section 224n prohibits the filing of an adoption petition by unauthorized persons. Specifically, authorized persons are those prospective adoptive parents with whom the child has been placed for adoption (not foster care) and who have successfully completed the six-month supervisory period gaining agency approval to file such petition. The purpose of such legislation restricting valid petitions was to reserve the decision making process to the agency.

The California Court of Appeal upheld this statute and the authority of the agency thereunder in the In re Runyon case:

"The agency should be free to make a determination of the suitability of a home for the child relinquished to its care, otherwise the section would be frustrated. To allow



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persons not approved by the agency as prospective adoptive parents to file petition for adoption would frustrate the purposes of the adopting agencies and subject the child to an indefinite status, keeping him from a permanent home pending litigation that could result."

(74 CR 514, 268 C.A.2d  
918, 1968)

This proposal would have a similar effect on the adoption process. Any "interested person" could frustrate the purposes of the adoption agency by tying up a foster or adoptive placement for a period of years.

"The section shows that it is the intention of the Legislature that where a parent or parents place a child with an adoption agency only the prospective adoptive parents selected by the agency may adopt that child."

(In re Runyon, 74 CR 514, 268  
C.A.2d 918, 1968)

The above discussion concerns legal difficulties with the proposal. I am sure you are aware of the many practical difficulties. It is hoped that the foregoing will enable you to reduce or modify this proposal to its proper perspective.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



January 17, 1973

Mr. Joseph Botka  
Chief Probation Officer  
Juvenile Court  
375 Woodside Avenue  
San Francisco, California 94127

Subject: Residency Requirements for  
Juvenile Justice Commission

Dear Mr. Botka:

On September 12, 1972 Rose B. McGrorey, as Acting Chief Probation Officer, requested my advice as to whether the change of residence of a Juvenile Justice Commission member required the termination of his appointment. This letter is confirmation of advice provided by phone on an earlier date.

In the 1932 Charter of the City and County of San Francisco, the members of the former Juvenile Probation Board were designated officers of the City and County of San Francisco by Charter Section 4, and as officers, were required to be city residents by Charter Section 7.

In 1961, the Juvenile Justice Commission system was established by state statute (W & I Code, §§525 et seq.) to supersede such Juvenile Probation Boards in counties having a population of less than 2,000,000. (W & I Code §540.) The current Juvenile Justice Commission functioning in the City and County of San Francisco is governed by the Welfare and Institutions Code provisions rather than the superseded Charter provisions.

Sections 525 et seq. of the Welfare and Institutions Code contain no residency requirements for commission members. Welfare and Institutions Code Section 526 permits one commission to serve two or more adjacent counties.

The change of residence by a Juvenile Justice Commission member does not require the termination of his appointment under the Welfare and Institutions Code.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



January 19, 1973

Mr. Charles Countee, Director  
Model Cities Agency  
301 Second Street  
San Francisco, California 94103

Subject: Whether Necessary for City Purchaser  
to Negotiate and Execute Operating  
Agency Agreements

Dear Mr. Countee:

You have asked whether it is necessary for the City Purchaser to negotiate all Model Cities Agency Contracts. In this connection we have discussed contracts for technical or consultant's services and operating agency agreements.

The operating agency agreements are an integral part of the federal Model Cities program which the City is responsible for locally pursuant to a contract between the City and the United States Department of Housing and Urban Development (HUD). Pursuant to each agreement, either a public agency or a private legal entity is engaged to carry out a particular project which is part of the Model Cities program. These projects are 100 per cent federally funded, and it is not contemplated that the Model Cities Agency itself will operate any of them. Rather, the very function of the Model Cities Agency, itself 80 per cent federally funded, is to negotiate these operating agency agreements and to monitor performance under them.

Technical and consultant's services contracts are not for the purpose of implementing a particular project but, rather, are for the purpose of purchasing for the Model Cities Agency the expertise or special services needed to enable the Agency to effectively fund and monitor the programs supported under the Model Cities program.

The relevant provisions of the City Charter are found in Chapter One of Article VII. The key provision is found in the first paragraph of Section 7.100:





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"The purchaser of supplies shall purchase all materials, supplies and equipment of every kind and nature, and enter into agreements for all contractual services required by the several departments and offices of the city and county, except as in this section otherwise provided. Purchases of books, magazines and periodicals for the library departments, works of art for museums and other articles or things of unusual character as to the purchasing thereof, may, on the recommendation of a department head and the approval of the purchaser, be purchased directly by said department head." (Emphasis added.)

It is my opinion that unless an exception is granted under Section 7.100 of the Charter, the Purchaser must, under that Charter provision, handle all contracts for technical or consultant's services, but that the Purchaser is not required to handle the negotiations for and execution of the operating agency agreements.

My conclusion is based upon an analysis of the function of these two kinds of contracts. The significant difference is simply that, whether or not the services are of an unusual nature, the contract for technical or consultant's services is in the nature of a procurement contract and the immediate beneficiary of the contract is a City agency or department. The services purchased are obtained because they are "required by" the agency within the meaning of the underlined portion of Section 7.100 quoted above. The operating agency agreements, on the other hand, have as their immediate purpose the provision of benefits and services to third parties rather than to the City as such.

An example of each type of contract may illustrate the difference: when your agency hires a consultant to audit the books of an operating agency, that consultant is performing a service which directly benefits your agency and the City in meeting its responsibility to assure that grant funds are used for authorized purposes. When you contract with an operating agency, for example, the Mission Child Care Consortium, the immediate beneficiaries of the funds obligated under the contract are the children and their parents who are served by the day care centers which are established pursuant to that agreement.

As stated above, since the Model Cities Agency operating agency agreements are not for the purpose of



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acquiring services or benefits required to operate the Model Cities Agency itself, they are not covered by Charter Section 7.100 and it is not required that the Purchaser be involved in the negotiation and execution of them.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



February 9, 1973

Mr. John C. Farrell  
Secretary and Assistant General  
Manager, Administrative  
Public Utilities Commission  
287 City Hall  
San Francisco, California 94102

Subject: Commission Comments Requested by  
Supervisor Kopp; Findings of Fact

Dear Mr. Farrell:

You have requested the "written comments" of this office upon a recent letter (1/17/73) from Supervisor Kopp to members of the Public Utilities Commission asking for their "feelings" and "thoughts" concerning legislation he has been asked "to introduce before the Board of Supervisors."

According to Supervisor Kopp's letter, the proposed legislation

"would provide that city commissions specify the factual conclusions upon which a particular commission decision is based in those cases where conflicting issues of fact are raised. In legal terms, such factual conclusions are called 'findings of fact'."

In keeping with your request to us, we comment as follows:

It is true, as stated in the Kopp letter, that by explicit demand in certain Federal and California Statutes and governing regulations, findings of fact are required as part of the processes for action of various boards, commissions and bureaus in the Federal and State domains. A notable example of such requirement is found in the California Administrative Procedure Act. (Government Code Sections 11.500 et seq.; 2 Cal.Jur.(2) 268.) Section 11518 pointedly requires findings but such requirements apply only to the proceedings held before certain State boards, bureaus and districts (see Section 11501). Such requirements for "findings"



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do not apply to a local entity board such as the Public Utilities Commission of the City and County of San Francisco. (Allen v. Humboldt County Board of Supervisors, 220 Cal.App.(2) 877.) Of course, Federal statutes or regulations of the nature now being considered would apply only to Federal boards and commissions, and not to our Public Utilities Commission.

As to Supervisor Kopp's "proposed legislation" - to use the designation resorted to by him in the second paragraph of his letter - we are compelled to the assumption that he is referring to an ordinance, rather than to a possible charter amendment. It would seem certain that had "charter amendment" been within his contemplation, the same would have been at least stated as an explicit alternative for effecting the desirable ends he envisions in the third and fourth paragraphs of his letter. Hence, we treat the Kopp letter as suggesting that an ordinance would suffice to determine the "findings" issue.

In our opinion, such an ordinance would violate City's charter.

Charter Section 2.101 provides in part as follows:

"The powers of the city and county, except the powers reserved to the people or delegated to other officials, boards or commissions by this charter, shall be vested in the board of supervisors and shall be exercised as provided in this charter.

"The exercise of all rights and powers of the city and county when not prescribed in this charter shall be as provided by ordinance or resolution of the board of supervisors."  
(Emphasis added.)

It is clear from the foregoing that when a right or power is "prescribed in this charter" as being "delegated to other officials, boards or commissions," the Board of Supervisors is not empowered to enact ordinances governing the charter-granted rights and powers of such other officials, boards and commissions. Of course, the Board of Supervisors is empowered to submit charter amendments to the electorate, but, as discussed above, the frame of reference in the Kopp letter seems to involve a proposed ordinance rather than a proposed charter amendment. Also, Charter Section 2.101, allows the Board of Supervisors, by ordinance, to confer "other and additional powers" upon boards and commissions - that is, "other and additional powers" to those already granted by the charter; but does not permit the Board of Supervisors to exercise powers already reposed by charter in another board or commission.





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Charter Section 3.500, relating to "General Powers and Duties" of "Boards and Commissions," provides in part as follows:

"Each board and commission

. . . shall have powers and duties . . . :

"(a) To prescribe reasonable rules and regulations not inconsistent with this charter for the conduct of its affairs, for the distribution and performance of its business . . .

. . .

"(i) . . . Each board or commission shall keep a record for the proceedings at each meeting and a copy thereof shall be forwarded promptly to the mayor . . ."  
(Emphasis added.)

Thus, an aggregate reading of Charter Sections 2.101 and 3.500 indicates that the Public Utilities Commission is alone empowered to decide whether, in the conduct of the determinative processes through and by which it manages the utility departments entrusted to its care, it shall further explain its judgments and decisions by making "findings of fact."

In the latest exercise of its own rule-making power (effective September 27, 1972), the Public Utilities Commission, pursuant to the authority conferred upon it by Charter Section 3.500, has prescribed a procedure for transacting its business and reaching its official decisions during the regular and special meetings convened for such purposes. Nowhere in said rules does the Commission make a "findings of fact" a necessary element of its decisional process, and Charter Section 2.101 prevents the Board of Supervisors from adopting an ordinance to create such necessity.

The foregoing conclusions are purely legal, and are in no way intended to reflect upon or influence the issue of whether, during any public administrative proceeding, a decision by the acting and determining body should be accompanied by "findings of fact." It is obvious that there are certain advantages flowing out of the illuminative nature of such findings, and it would seem to be a policy issue for a board or commission to determine whether the additional administrative burdens of preparing findings would outweigh any such advantages. However, as noted above, unless our charter is amended to provide otherwise, such issues are within the rule-making power of the respective boards and commission, and may not be controlled by ordinance of the Board of Supervisors.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



February 13, 1973

Mr. Edward F. Callanan, Jr., President  
Library Commission  
San Francisco Public Library  
Civic Center  
San Francisco, California 94102

Subject: Inquiry of Library Commission  
Regarding Meeting and Conferring  
and Section 3.500 of the Charter

Dear Mr. Callanan:

This is in response to your letter pointing out that the Library Commission has been approached by representatives of employee groups regarding matters of personnel and administration which have not been discussed in detail with the chief officer, the City Librarian, and asking my advice as to the circumstances under which the Library Commission can discuss such matters with library personnel or their representatives. You raise the question in your letter as to whether such discussion would constitute a violation of the provisions of Section 3.500(1) of the Charter.

In resolving this question, all the pertinent provisions of §3.500 must be considered together and harmonized. Those provisions are as follows:

"3.500 Boards and Commissions

"Each board and commission appointed by the mayor, or otherwise provided by this charter, shall have powers and duties as follows:

"(a) To prescribe reasonable rules and regulations not inconsistent with this charter for the conduct of its affairs, for the distribution and performance of its business, for the conduct and government of its officers and employees, and for the administration, custody and protection of property under its control and books, records and papers appertaining to its affairs . . . . (Emphasis added.)



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"(i) . . . . Except for the purpose of inquiry, each board or commission, in its conduct of administrative affairs under its control, shall deal with such matters solely through its chief executive officer.

"Each board or commission relative to the affairs of its own department, shall deal with administrative matters only in the manner provided by this charter, and any dictation, suggestion or interference herein prohibited on the part of any member of a board or commission shall constitute official misconduct; provided, however, that nothing herein contained shall restrict the power of hearing and inquiry as provided in this charter."

As you will note from the provisions of subparagraph (a) of Section 3.500, the Library Commission has not only the power but also the duty to prescribe reasonable rules and regulations for the conduct and government of its officers and employees. In order to properly effectuate this responsibility, it is thoroughly appropriate that the Library Commission confer with library personnel and their representatives regarding matters of personnel and administration; however, once the Commission has prescribed the rules and regulations for the conduct and government of its employees, it is within the jurisdiction of its chief officer, the City Librarian, to enforce and carry out such rules and regulations. In this area, Section 3.500(i) requires that the Commission deal with such matters solely through its chief executive officer.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



February 23, 1973

Mr. Frank Bei  
General Claims Agent  
San Francisco Municipal Railway  
949 Presidio Avenue  
San Francisco, California 94115

Subject: February 20, 1973 Decision of Supreme Court  
Holding Unconstitutional California Guest  
Law and Overruling Prior Decisions. (Brown  
v. Merlo, Sac. 7947.)

Dear Mr. Bei:

This replies to your February 21 memorandum asking:

1. If the passenger in the auto is injured as a result of the collision with a Municipal Railway transit vehicle and there is contributory negligence on the part of both drivers, can we now request a contribution from the auto insurance carrier toward the settlement of the passenger?
2. Is the ruling retroactive?
3. If so, to what date?

The answers to your questions are:

1. Yes.
2. Yes.
3. To date of enactment of guest law. That law was always invalid and cases sustaining its validity were simply bad law. The statute of limitations on the injured guest's cause of action would be the only bar. That is, if a plaintiff passenger failed timely to sue his (her) host (one year to sue the host, C.C.P. §340, subd. 3), the Brown v. Merlo decision would have no effect on the





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running of the statute against the plaintiff passenger as respects the host.

The Brown v. Merlo accident occurred October 15, 1967 and there was no question the passenger sued the host within a year.

If the statute has not run on the guest's action against the host (or the City), the guest can sue both host and City, and, if judgment is against both and one satisfies it, the other can have contribution. (C.C.P. §§875-880.) The contribution statute itself applies to causes of action accruing on or after January 1, 1958. (C.C.P. §880.)

The same principle would, of course, apply to settlements.

The Brown v. Merlo accident appears to have been a sole tortfeasor situation (host ran off road and hit embankment), hence apparently has no contribution aspect. But this would not affect the principle that, now, the host's liability is not different from that of any other tortfeasor, and the host is treated like any other tortfeasor.

Under the general rule of retroactivity of appellate decisions (see below), that principle applies to prior accidents, pending cases, and cases subsequently filed in which there are two or more tortfeasors, namely: the host is liable for ordinary negligence and, like any other tortfeasor, for contribution.

Where contract or property rights have vested by virtue of decisions (later overruled), it has been the rule to give prospective rather than retrospective effect to the overruling decision. But otherwise the general rule that an overruling decision is retrospective in operation and effect -- an overruling decision declares what always was the law, the overruled decisions being merely bad law and never having been the law, applies. (County of L.A. v. Faus, 48 C.2d 672, 680-681.)

In Brown v. Merlo the court was merely dealing with tort law and a statute (guest law) which, because of the equal protection clause, was always invalid. The Court was not dealing with contract or other property rights acquired under overruled decisions. Hence the general rule of retrospective operation applies. Of course the overruling decision has no effect on (does not reopen) prior final judgments. An erroneous judgment (e.g., one denying recovery to a passenger against his negligent host) which has become final is just as conclusive as a correct one. (Panos v. Great Western Packing Co., 21 C.2d 636, 640.)



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Brown v. Merlo will be final 30 days from February 20, 1973 unless a rehearing is granted. I would not expect one to be granted.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



February 28, 1973

Mr. S. M. Tatarian, Director  
Department of Public Works  
260 City Hall  
San Francisco, California 94102

Subject: Judah Street Sidewalk Narrowing

Dear Mr. Tatarian:

This is in response to your recent inquiry with respect to the above captioned subject. You advise that, in order to improve streetcar service on Judah Street between 9th Avenue and 48th Avenue, your department, in conjunction with the Municipal Railway, is considering a plan which would provide for the narrowing of the sidewalks on Judah Street so as to allow one lane in each direction for automobile traffic, one lane for parking in each direction, and a semi-exclusive right-of-way for streetcars. The streetcar area would be separated from the auto lane by raising the level of the streetcar area about three inches higher than the adjacent pavement, and paving it with a different material. To implement the plan an ordinance would be submitted to the Board of Supervisors which, if enacted, would make it illegal to drive any vehicle over, upon or across the raised streetcar right-of-way except for entry into or exit from a garage or driveway fronting upon Judah Street or to pass a disabled vehicle in the traffic lane. The former exception would be necessary in the event the turning radius of the vehicle or the restricted width of the curb cut for the garage or driveway, or both, precluded entry into or exit from the garage or driveway from or into the traffic lane. A question has arisen as to the validity of the proposed ordinance in view of the provisions of Section 21651 of the Vehicle Code. Accordingly, you have requested that I review this question and if I find that the proposed ordinance would conflict with Section 21651, that I indicate, if possible, a method by which vehicles entering or leaving driveways on Judah Street may be allowed to utilize the streetcar area in a legal manner.

Section 21651 of the Vehicle Code reads as follows:

"It is unlawful to drive any vehicle upon any highway which has been divided into two or more



roadways by means of intermittent barriers or by means of a dividing section of not less than two feet in width either unpaved or delineated by curbs, lines, or other markings on the roadway except to the right of the barrier or dividing section, or to drive any vehicle over, upon, or across the dividing section, or to make any left turn or semicircular or U-turn on any such divided highway, except through an opening in the barrier designated and intended by public authorities for the use of vehicles or through a plainly marked opening in the dividing section."

The term "highway" as used in the Vehicle Code includes a city street. (Vehicle Code, Sec. 360.)

Accordingly, it would appear that the proposed ordinance conflicts with Section 21651 in that it would legalize an act the Legislature has prohibited, to wit, driving a vehicle over, upon or across the dividing section of a divided highway.

However, in interpreting the provisions of a statute it is a well settled rule of construction that statutes upon the same subject matter be construed together. With respect to the subject of divided highways, Section 144 of the Streets and Highways Code provides as follows:

"The State Highway Engineer is authorized to divide or separate any state highway into separate roadways wherever there is particular danger to the traveling public of collision between vehicles proceeding in opposite directions or from cross traffic by constructing curbs, central dividing sections or other physical separations, or by signs, marks or other devices in or on the roadway appropriate to designate the dividing line.

"The rules governing operation of vehicles on divided highways are contained in Section 21651 of the Vehicle Code."

In Blanton v. Curry (1942) 121 P.2d 125, the plaintiff was struck by defendant's automobile as he was crossing a city street. The street in question consisted of two roadways each running north and south and divided by a parkway in the center. The accident occurred in the westerly roadway and the defendant was driving north or to the left of the dividing section. The District Court of Appeal held that the street did not come within the provisions of Section 144 of the Streets and Highways Code which, at the time, read as follows:





"The State Highway Engineer is authorized to divide or separate any State highway into separate roadways wherever there is particular danger to the traveling public of collision between vehicles proceeding in opposite directions or from cross traffic by constructing curbs, central dividing sections or other physical separations, or by signs, marks or other devices in or on the roadway appropriate to designate the dividing line.

"It is unlawful for any person to drive a vehicle over, upon or across any such curb, central dividing section, or other separation, or dividing line. It is unlawful for the operator of any vehicle to make a left turn or a semi-circular or U turn on any such divided highway, except through an opening in said dividing curb, section, separation or line.

"It is unlawful to drive any vehicle on any such divided highway except to the right of the central dividing curb, separation, section or line.

"Any person who violates any provision of this section is guilty of a misdemeanor." (1939 Stats., c. 268, p. 1520.)

The Blanton case was affirmed and supplemented by the State Supreme Court (20 Cal.2d 793, 129 P.2d 1).

As you will note, the first paragraph of Section 144 of the Streets and Highways Code, before the Court in the Blanton case, supra, is unchanged, and the balance of said section is substantially the same as Section 21651 of the Vehicle Code, supra, as it now reads. Accordingly, upon the authority of the Blanton case, supra, it is my opinion that the provisions of Section 21651 of the Vehicle Code apply only to state highways which have been divided into separate roadways pursuant to Section 144 of the Streets and Highways Code and are not applicable to city streets which have been divided into separate roadways.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



February 8, 1973

Mr. Paul Yuke, Business Manager  
Recreation and Park Department  
McLaren Lodge, Golden Gate Park  
San Francisco, California 94117

Subject: Golden Gate Park Tennis Professional

Dear Mr. Yuke:

This is in response to your letter of October 30, 1972 requesting my opinion as to whether the following duties and responsibilities could be assigned to and assumed by the tennis professional at the Golden Gate Park tennis courts under contract with the City: taking weekend reservations for use of the courts; collecting the reservation fees; issuing lockers for a fee; and providing overall supervision of the tennis courts. You point out in your letter that the foregoing duties are currently assigned to the full time recreation director at the tennis courts, who would be reassigned to a recreation facility that is understaffed.

Section 8.300 of the Charter requires that all positions in the City and County of San Francisco service, with certain specified exceptions not relevant here, shall be included in the classified civil service of the City and County. The duties described in your letter that would be assumed by the tennis professional under the proposed contractual arrangement are the duties of a position in the classified civil service and are presently being performed by a civil service employee. The assignment of these duties to the tennis professional under a contract would constitute a violation of Section 8.300 of the Charter, and you are accordingly advised that it is my opinion that such a contractual arrangement may not be legally effected. (For a more complete discussion of the legal principles and authorities applicable, see City Attorney Opinion Letter No. 70-38, dated July 14, 1970, a copy of which is attached.)

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



February 23, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Veterinarians and Animal Control  
Ordinance. Your File No. 233-72

Dear Mr. Dolan:

You asked, in your letter of January 24, whether there might be preemption by the State which could prevent passage of Section 67.1 of the Health Code, requiring veterinarians to report the name and address of owners of dogs receiving preventive treatment for certain listed diseases.

The only State provision which relates to this area is Section 2030 of Title 16 of the California Administrative Code, entitled "Recordkeeping." That section provides as follows:

"Every veterinarian performing any act requiring a license under provisions of Chapter 11, Division 2 of the Business and Professions Code, upon any animal or group of animals in his custody or in the custody of an animal hospital, shall make a written record concerning the animal or animals which shall contain the majority of the following information if available:

"(a) Name, address and phone number of animal's owner.

"(b) Name and identity of the animal.

"(c) Age, sex and breed of the animal.

"(d) Dates (beginning and ending), of custody of the animal.



Mr. Robert J. Dolan

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"(e) A short history of the animal's condition as it pertains to the animal's medical status.

"(f) Diagnosis or condition at beginning of custody of animal.

"(g) Record of medications, treatments, progress and disposition of the case.

"(h) Names of any other persons (other than the veterinarian's own employees) furnishing professional advice, performing treatments, examinations or other services."

There is no provision which would indicate that the State of California intended to preempt the field with respect to the ancillary duties of veterinarians. Although there does not appear to be any California authority directly on the point, it is generally regarded as a proper exercise of a municipality's police power to require by ordinance that all dogs in a city be vaccinated even where a statute does not require vaccination of dogs kept in an enclosure, under leash or muzzles. (Stubbs v. Mitchell (Ohio App.) 114 NE 2d 158; Birmingham v. West, 236 Ala. 434, 183 So 421.)

And the California Health and Safety Code, in its provisions concerning rabies (Div. 3, Ch. 3 §§1900, et seq.) provides that upon the determination that rabies exists in any county or city, a special dog license shall become effective, but grants authority to the city to set the rate of such license.

The control of rabies and similar licenses in animals, although not exclusively a municipal affair, is the proper subject of the municipality's police power, excepting a conflict between a municipal ordinance and a state law.

Further, a provision requiring veterinarians, who are the only class permitted to administer immunizations to animals, to report the administration of such immunizations would bear a reasonable relationship to the purposes of public health implied by Section 67.1.

If, therefore, the addition of Section 67.1 to the Health Code is intended as a means to safeguard public health through a record of those dogs in the City and County of San Francisco which have been immunized against the enumerated diseases, there does not appear to be any objection to that provision.





Mr. Robert J. Dolan

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Further, since veterinarians are already required by Section 2030 of the State Administrative Code (quoted above) to record such information as would be required by Section 67.1, it would seem to place no onerous burden upon them to require that they file such a report as is required by Section 67.1 every 10 days.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



February 27, 1973

Mr. Philip J. Kearney  
Executive Director  
Health Service System  
450 McAllister Street  
San Francisco, California 94102

Subject: Effect of Amendments to Charter Sections  
8.423 and 8.428 on Contribution to Health  
Service System Required of Retired Persons

Dear Mr. Kearney:

You have requested my opinion with respect to certain questions posed by the Retired Employees of the City and County of San Francisco concerning the amendments to Charter Sections 8.423 and 8.428 adopted by the electorate at the election held on November 7, 1972, and the effect, if any, of such amendments upon the contributions to be required of retired persons participating in the Health Service System.

The amendments in question are to become effective July 1, 1973. At the present time, subparagraph (b) of Section 8.428 requires that the City and County, San Francisco Unified School District and San Francisco Community College District shall each contribute to the Health Service fund:

" . . . contributions . . . equal to the amounts contributed thereto by members of the system, provided, however, that the total amount contributed by the city and county and the school district to the health service system fund in each fiscal year, for this purpose, shall not exceed an amount equal to the tax yield that can be produced in each fiscal year by six cents in the tax rate on each one hundred dollars (\$100.00) valuation of the real and tangible personal property assessed in and subject to taxation by the city and county and the school district."



Mr. Philip J. Kearney

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February 27, 1973

With respect to the contributions presently required of retired persons, subparagraph (c) of Section 8.428 provides:

"Monthly contributions required from retired members participating in the system shall be equal to the monthly contributions required from members in the system . . . "

Subparagraph (c) provides further that the City and County, Unified School District and Community College Districts shall contribute each fiscal year "funds sufficient to defray the difference in cost to the system in providing the same health coverage to retired members as is provided for active employee members. . . "

The amendments to Sections 8.423 and 8.428 which become effective July 1, 1973, establish a new procedure for determining the contributions required of the City and County, Unified School District and Community College District. As amended, Section 8.423 provides that, prior to the second Monday in January in each year, the Health Service Board shall conduct a survey of the ten most populous counties in California to determine the average contribution made by each such county toward providing health care plans, exclusive of dental or optical care, for each employee of such county. In accordance with that survey, the Health Service Board is then required to determine "the average contribution" made with respect to each employee by these ten counties and to certify to the Board of Supervisors the amount of "the average contribution." For the fiscal year commencing July 1, 1973, the City and County, Unified School District and Community College District are required to contribute to the Health Service fund for each of their members an amount equal to one-half of "the average contribution." For the fiscal year commencing July 1, 1974, and for each fiscal year thereafter, the City and County, Unified School District and Community College District will be required to contribute to the Health Service fund for each of their members an amount equal to "the average contribution."

It is my understanding that, in accordance with the provisions of Section 8.423, the Health Service Board has certified to the Board of Supervisors that "the average contribution" is \$21.05 per month. Therefore, for the fiscal year commencing July 1, 1973, the City and County, Unified School District and Community College District will be required to contribute monthly to the Health Service fund for each of their members an amount equal to one-half of \$21.05, or \$10.53. If the monthly contribution required of a member exceeds the sum of \$10.53, the member, of course, will have to provide the balance of the required contribution. You have advised me that the Health Service Board has not as yet established the rates of contribution for the next fiscal year. Consequently, I am unable to state what amount, if any, will be required to be contributed by the members.



Mr. Philip J. Kearney

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February 27, 1973

With respect to the contributions which will be required of retired persons, subparagraph (c) of Section 8.428, as amended, provides:

"Monthly contributions required from retired persons participating in the system shall be equal to the monthly contributions required from members in the system, except that the total contributions required from retired persons who are also covered under Medicare shall be reduced by an amount equal to the amount contributed monthly by such persons to Medicare . . ."

The underlined language means that a retired person shall have the monthly contribution which would otherwise be required of him decreased because of his contributions to Medicare. I understand that the Retired Employees contend that, if a retired person's monthly contribution to Medicare exceeds the monthly contribution which he would otherwise be required to make to the Health Service System, an amount equal to such excess should be paid by the Health Service System directly to the retired person. In brief, the contention contemplates that the retired person be fully reimbursed by the Health Service System for his Medicare contributions.

The amendatory language quoted above does not support such a contention. The language provides simply for a reduction in the Health Service contribution required of a retired person who is also contributing to Medicare. If the monthly Medicare contribution made by a retired person exceeds the contribution which he otherwise would be required to make to the Health Service System, the effect of the amendatory language would be that his Health Service contribution would be reduced to zero. There is nothing in the language which indicates an intent that such person is also to receive a direct cash payment each month from the Health Service System.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





March 1, 1973

Mr. Rudy Tham, President  
San Francisco Fire Commission  
260 Golden Gate Avenue  
San Francisco, California 94102

Subject: Binding Effect of Memorandum of Understanding  
Upon Parties Signatory Thereto

Dear Mr. Tham:

This is in reply to your request for my opinion as to whether or not, under the provisions of the memorandum of understanding with Firefighters Local 798, an agreement reached between the Fire Commission and Local 798 involving the creation of new positions and the expenditure of funds is binding upon the Mayor and the Board of Supervisors.

The preamble to the memorandum of understanding (hereinafter M.O.U.) states as follows:

"This memorandum constitutes a mutual agreement between Firefighters Union, Local 798, hereinafter referred to as the Union, and the City and County of San Francisco, through its statutory representatives, the Mayor and the Fire Commission thereof, and its governing body the Board of Supervisors thereof, hereinafter collectively referred to as the Employer."

This M.O.U. was signed by the Mayor, the Fire Commission and Local 798 on December 11, 1972 and was adopted by resolution of the Board of Supervisors on the same date. (See my Letter Opinion No. 72-105 of October 27, 1972.)

It should be pointed out that those parties signatory to the M.O.U. make no indication that they are acting on behalf of or agent for any other department, commission or officer of the City and County of San Francisco.

Therefore, while the M.O.U. indicates that the Mayor, the Board of Supervisors and the Fire Commission are collectively



Mr. Rudy Tham

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March 1, 1973

referred to as "the employer" there is nothing to indicate that the parties signatory thereto are acting in any capacity or exercising any authority other than that which they possess and as is set forth in the Charter.

As stated in Wilbur v. Office of City Clerk (1956) 143 C.A.2d 636 at page 643:

"The powers of municipal officers are prescribed by the provisions of city charters and ordinances passed pursuant thereto."

With regard to the appropriation of funds and the creation of ten (10) new positions in the Fire Department the powers and duties of the pertinent officers and commission are clearly defined in Charter Sections 6.100 et seq. and 8.200 respectively.

In reviewing these sections it is apparent that new positions in the City and County may only be created by appropriation ordinance of the Board of Supervisors upon the recommendation of the appointing officer, that the Board of Supervisors has the duty to pass the annual appropriation ordinance and also has the power and duty to adopt supplemental appropriation ordinances.

Specific limitations upon the expenditure of City funds and the creation of obligations for the expenditure of such funds are found in Charter Section 6.303 which reads in part:

"No money shall be drawn from the treasury of the city and county, nor shall any obligation for the expenditure of any money be incurred except in pursuance of appropriations or transfers made as in this charter provided."

and in Charter Section 6.306 which reads in part:

"No ordinance or resolution for the expenditure of money, except the annual appropriation ordinance, shall be passed by the board of supervisors unless the controller first certify to such board that there is a sufficient unencumbered balance in a fund that may legally be used for such proposed expenditure, and that, in the judgment of the controller, revenues as anticipated in the appropriation ordinance for such fiscal year and properly applicable to meet such proposed expenditure will be available in the treasury in sufficient amount to meet the same as it becomes due."



Mr. Rudy Tham

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March 1, 1973

The Meyers-Miliias-Brown Act (Gov. Code §§3500-3510) which governs the meeting and conferring process for public employees in California, states in pertinent part in Section 3500 as follows:

"Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances and rules of local public agencies which establish and regulate a merit or civil service system . . ."

In McQuillin, Municipal Corporations (3rd Ed.), Sections 29.06 and 29.07 at pages 239 and 244, the issue of contracting, so far as here pertinent, is discussed thusly:

"Contracts prohibited.

"One entering into a contract with a municipality must ascertain whether the contract complies with the constitution, statutes, charters and ordinances so far as they are applicable.

"Contracts limiting legislative power.

"As stated heretofore, the officers of a municipal corporation cannot confer public powers upon others, nor delegate legislative powers; nor can powers conferred upon, or which appertain, or properly belong, to any office or department be surrendered or transferred and be performed by others. . . ."

A review of the M.O.U. in question fails to indicate that any attempt has been made by the Mayor or the Board of Supervisors to relinquish their Charter powers to the Fire Commission or, in any other manner, have said Commission act as their agent for the purpose of reaching agreements. If such attempt has been made, it appears from the authority above that such delegation or transfer of their respective Charter powers and duties would be invalid.

It is therefore my opinion, based upon the foregoing that agreements reached between Local 798 and the Fire Commission regarding the creation of new positions and the expenditure of funds are not binding upon the Mayor and the Board of Supervisors.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



March 2, 1973

Mr. S. Myron Tatarian, Director  
Department of Public Works  
260 City Hall  
San Francisco, California 94102

Subject: Restricting Trucks to a Single Lane. File #25

Dear Mr. Tatarian:

This is in reply to your request for an opinion as to whether under existing laws trucks may be restricted to a single lane in both northbound and southbound directions except immediately prior to making a turn off Third Street.

Section II of Article XI of the Constitution of the State of California states:

"Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

The legislature has not enacted any legislation which would prevent the City and County of San Francisco from enacting an ordinance limiting trucks on Third Street to a single lane in both directions with appropriate provision for turning off of Third Street.

In fact, Section 21100 of the Vehicle Code states, among other provisions, that "local authorities may adopt rules and regulations by ordinance or resolution . . . regulating traffic by means of semaphores or other official traffic control devices."

Even without said provision, the City and County of San Francisco could legislate since such reasonable local laws are not in conflict with the state statutes.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney







March 2, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Elections; Propriety of Supervisor's Staff  
Answering Inquiries of Voters on Election Day

Dear Mr. Dolan:

This is in response to your letter wherein you advise that Supervisor John L. Molinari has requested my opinion as to whether or not the following infringed, in any manner, upon the duties of the Registrar of Voters, or could be construed as violative of any provisions of the Charter:

On November 7, 1972, the date of the general election, certain members of the Board of Supervisors staffed their offices for the purpose of receiving telephone calls from any voters who had any questions in connection with the exercise of his or her right to vote and notice of such service was publicized in the local press prior to election day. In dealing with such questions, the staff members answered those questions within their competence and, if unable to do so, obtained the information from the Registrar's office and relayed it to the inquirer.

The powers of the City and County, except the powers reserved to the people or delegated to other officials, boards or commissions are vested in the Board of Supervisors. (Charter Sec. 2.101.) Among the powers vested in other officials by the Charter is the power to conduct, manage and control the holding of elections and this power is vested exclusively in the Registrar of Voters. (Charter Sec. 9.102.) In the exercise of this power, the Registrar is governed by the provisions of the Charter (Charter Sec. 2.101) which incorporates all the provisions of general State law respecting elections, except as otherwise provided by the Charter or by ordinance adopted by the Board of Supervisors relative to any rights, powers or duties of the City and County or its officers (Charter, Sec. 9.103).



Mr. Robert J. Dolan

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March 2, 1973

Among the provisions of general State law respecting elections are the following sections of the Elections Code:

"§14002.5 Telephone number

"The county clerk shall furnish to each polling place a sufficient number of cards, but no less than five, containing the telephone number of the office to which an elector may call to obtain information about his precinct location. The card shall also set forth the fact that an elector may call the number collect during the polling hours. The county clerk shall accept all calls, the cost of which shall be a charge against the general fund of the county.

"If the precinct board is unable to find an elector's affidavit in the book of original affidavits of registration or his name upon the index of registration and is unable to call the clerk's office on behalf of the elector, the precinct board shall furnish the elector a copy of the card set forth in this section."

"§14002.6 Receipt of phone calls

"The county clerk shall assign a qualified person in the county clerk's office who shall receive the phone calls provided for by Section 14002.5 and who shall answer those questions concerning voting which those persons at the polling place are unable to accurately answer."

In the City and County of San Francisco, the "county clerk" referred to in Sections 14002.5 and 14002.6 of the Elections Code is the Registrar of Voters. (Elections Code, Sec. 17.)

In view of the foregoing, it is my opinion that service offered to voters on election day by certain of the supervisors, as set forth hereinabove, was an infringement upon the duties of the Registrar of Voters as set forth in Section 14002.5 and 14002.6 of the Elections Code. However, it is my further opinion that it would not be improper for any supervisor to offer the services of members of his staff to the Registrar on Election Day to assist the person assigned by the Registrar to receive phone calls and answer voter's questions pursuant to Elections Code Section 14002.6.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



March 7, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Cancellation and Reduction of  
Taxes on the Vessel A. J. LaRocca,  
File No. 21-72-2

Dear Mr. Dolan:

In response to your referral memorandum of January 10, 1973, regarding the vessel A. J. LaRocca, it is the opinion of this office that the taxes for the years 1967 and 1968 on the subject vessel may properly be cancelled. However, no reduction of taxes for the years 1969, 1970 and 1971 is authorized under law, and therefore reduction of said taxes by the Board of Supervisors is prohibited.

According to the signed statement of Mr. LaRocca of September 15, 1972, the subject vessel was in Alaska from late 1966 through 1968. It is settled law, however, that regardless of the vessel's actual situs, the state of documentation or home port (domicile) may still impose an ad valorem property tax on the vessel consistent with the due process and interstate commerce clauses. Star-Kist Foods, Inc. v. Byram, 241 Cal.App.2d 313 (1966); Olson v. City and County of San Francisco, 148 Cal. 80 (1905). Revenue and Taxation Code Section 1140 provides for the City and County of San Francisco to impose such a tax since the vessel is and was documented here and no notice of habitual place of mooring was ever filed.

But it is also a settled principle of law that if the vessel is involved in interstate commerce and the owner can demonstrate that the vessel established an actual situs elsewhere, then an ad valorem property tax measured at full value is improper. Central Railroad Company of Pa. v. Pennsylvania, 370 U.S. 607 (1962); Star-Kist Foods, Inc. v. Byram, *supra*. Here Mr. LaRocca has stated that during the years 1967 and 1968, the subject vessel was in Alaska. As the court in Star-Kist observed at page 316:





Mr. Robert J. Dolan

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March 7, 1973

"If vessels are navigated wholly within the limits of one state, they acquire an actual situs there and may be taxed in that state although the owner is domiciled in another state."

This is underscored by the fact that California, in Revenue and Taxation Code Section 1138, provides for taxation of out-of-state vessels plying the waters of this state if the owners are California residents. During 1967 and 1968, Alaska could and may have taxed this vessel. The owner need only demonstrate the possibility of this power to tax, not actual taxation. Therefore, the taxes levied on the subject vessel for 1967 and 1968 were "erroneously or illegally" charged within Section 4986(1)(b) of the Revenue and Taxation Code, and they may be cancelled by resolution as enclosed.

With regard to the years 1969 through 1971, however, Mr. LaRocca did not comply with the filing provision of Sections 254 and 255 of the Revenue and Taxation Code. He did not file the proper affidavits as required by Section 254, and thus could not comply with the time limits set out in Section 255. Section 260, then, provides that the 1% tax exemption for vessels contained in Section 227 shall be waived if the required procedure is not followed. Therefore, for the years 1969 through 1971, Mr. LaRocca has waived his exemption claim.

With regard to the question whether the Board of Supervisors can still reduce the taxes, in effect "waive" the "waiver," no authority exists for such action. Article 13, Section 37, of the California Constitution requires taxation on full valuation unless exemption exists, the assessed value set at 25% maximum by Section 401 of the Revenue and Taxation Code. In view of such mandates, clear authority must exist before a lesser tax may be imposed or lesser payment accepted. No waiver provision for Section 260 exists. Absence of such a "late claim" procedure for the vessel exemption is doubly significant when the Revenue and Taxation Code does provide "late claim" procedures for college, veteran, church, exhibition, orphanage, welfare and homeowners' exemptions in Sections 270 and 273. The necessary implication to be drawn is that the legislature did not want any relaxation of the procedures for claiming the vessel exemption of Section 227. Added support for this position is found in 4 Ops. Cal. Atty. Gen. 45 (1944), wherein a church failed to file a timely affidavit, and it was stated:

". . . upon such failure to file, it becomes the duty of the County Assessor to assess the property."

Therefore, while legislation has been prepared cancelling taxes on the A. J. LaRocca for 1967 and 1968, no reduction of the taxes, penalties and interest due for the years 1969 through 1971 is permitted under law.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





March 7, 1973

Mr. James Wurm  
Assistant General Manager  
Personnel  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Whether an Employee Who Had Resigned  
Prior to the Enactment of Section 33.04  
of the Civil Service Rules is Entitled  
to Reinstatement Under That Section.

Dear Mr. Wurm:

This is in response to your request for opinion on whether an employee who has resigned from City service prior to July 1, 1972 is entitled to reinstatement to his position under the provisions of Section 33.04 of the Civil Service Rules. Section 33.04, which was enacted on July 1, 1972 provides as follows:

"A permanent appointee who resigns and whose services have been certified as satisfactory by the appointing officer, shall be permanently separated from such appointment except as follows:

"a. Upon his request, within a one (1) year period after the effective date of the resignation, the resignee with the approval of the General Manager, Personnel, may be appointed ahead of eligibles to a vacancy in a permanent position in the class from which he resigned, provided that no resignee may be offered appointment by reinstatement ahead of any available eligible who has higher rank on the same eligible list. The right for appointment under this provision will remain in effect for the life of the most recently adopted eligible list or two (2) years after the effective date of the resignation, whichever is later. Such appointment shall be further subject to the following:



Mr. James Wurm

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March 7, 1973

"1. If a vacancy does not exist in the classification from which resigned from City service, a resignee from a promotive classification may re-enter the service to a vacancy in his former next lower rank classification in any department.

"2. That when re-appointed, he shall enter the service as a new appointee with no rights based on prior service except such as may be specifically provided in the vacation, sick leave and Salary Standardization Ordinance, and in the examination procedures with respect to credit for prior City and County service."

Your request calls for a discussion as to whether Section 33.04 should be interpreted as operative to all employees who meet its conditions regardless of when they have resigned or whether it should apply only to employees who resign after July 1, 1972, which is the date that the section was enacted.

A statute should be given such interpretation as will promote rather than defeat the general purpose and policy of the law and, if possible, statutes will be so construed as to avoid absurd applications and consequences. (Dept. of Motor Vehicles v. Indus. Acc. Com., 14 Cal.2d 189; see also In re Cregler, 56 Cal.2d 308; Warner v. Kenny, 27 Cal.2d 627.) It is a well settled principle of statutory construction that an act will not be construed to be retroactive in the absence of either an express declaration to that effect or a very clear implication that such was the intent of the Legislature. (East Bay Municipal U. Dist. v. Garrison, 191 Cal. 680.)

Prior to the enactment of Section 33.04 of the Civil Service Rules, a resignation was final when approved by the Civil Service Commission or by the General Manager, Personnel. (Former Rule 28, Civil Service Rules.) Section 33.04 changes the resignation rule to permit reinstatement "within a one (1) year period after the effective date of the resignation." This amendment was obviously enacted for the benefit of both the employee and the City. It encourages qualified employees to return to City employment and this benefits the City to acquire experienced employees who can assume the duties of the position without training. The rule should be liberally interpreted to accomplish its purpose. Therefore, even though there is no express language declaring Section 33.04 to be retroactive, there is a very clear implication that it should be applicable to all former employees who have resigned and meet the conditions for reinstatement. This interpretation is consistent with the apparent purpose of the section and if a different result had been intended, the Civil Service Commission could have expressly made the section operative only to employees who



Mr. James Wurm

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March 7, 1973

resign on or after July 1, 1972. Its failure to so limit application of Section 33.04 further indicates that the rule should be liberally construed as applicable to all resignees who otherwise qualify.

Therefore, it is my opinion that Section 33.04 is applicable to employees who have resigned prior to July 1, 1972 if they otherwise meet the conditions of that section.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



March 7, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Cancellation of Taxes on Property  
Leased to Western Pacific Railroad  
Co., File No. 15-72-30

Dear Mr. Dolan:

Western Pacific Railroad Company had leased in 1970 certain lands and improvements thereon from the Port Commission. Thereafter, on April 1, 1972, the railroad vacated the premises after thirty days' notice. This request for cancellation of taxes was made with respect to the taxes levied for fiscal year 1972-73, even though the railroad was in possession of the property on March 1, 1972, the lien date for the following fiscal year. It is the opinion of this office that no authority exists for the cancellation of taxes as herein requested.

Western Pacific Railroad under lease from the Port Commission is subject to taxation upon its possessory interest in otherwise tax exempt property. The date the tax lien attached to this possessory interest for fiscal year 1972-73 was March 1, 1972, and the railroad still held its possessory interest on that date. The railroad points out that under Section 2801 of the Revenue and Taxation Code, this possessory interest could have been assessed separately to the railroad. Even if that is the case, a separate valuation does not authorize cancellation. Nor is Section 4986 authority for cancellation. That section provides for cancelling taxes after the lien date and before the start of the fiscal year on property acquired by the City and County by "a negotiated purchase and sale, gift, or devise . . . " Reversion of the fee simple interest to the Port Commission upon termination of the lease is not an acquisition within the meaning of Section 4986.





Mr. Robert J. Dolan

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March 7, 1973

Therefore, since Western Pacific Railroad Company was still in possession of this property on the March 1 lien date, no cancellation is authorized under the law. Absent such express authority, no cancellation can be made by the Board of Supervisors.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



March 9, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: File No. 38-73-9; Gift to City and  
County to Compensate Assistant to  
Executive Director of Committee for  
Performing Arts Center; Authority of  
Board of Supervisors to Accept Same

Dear Mr. Dolan:

This is in response to your recent letter inquiring as to the legal authority for the acceptance by the Board of Supervisors of the above-captioned gift.

The City and County is empowered to receive gifts and donations of all kinds of property in fee simple or in trust for charitable and other purposes, and to do all acts necessary to carry out the purposes thereof. (Charter, Sec. 1.101.) Each board or commission appointed by the Mayor, or otherwise provided by the Charter, is empowered, subject to approval by the Board of Supervisors, to receive, on behalf of the City and County, gifts for any purpose connected with or incidental to the department or affairs placed in its charge. (Charter, Sec. 3.500.) Where a gift is for a purpose not connected with or incidental to a department or affairs placed in charge of a board or commission, the Board of Supervisors is empowered to receive the gift on behalf of the City and County. (Charter, Sec. 2.101.) A recognized limitation upon the power of a municipal corporation to receive any such gift is that it be for a public purpose, germane to municipal objects. (10 McQuillin, Municipal Corporations, 45, 62.)

The San Francisco Committee for the Performing Arts Center was created by the Mayor in November, 1970, to form a non-profit organization to acquire a site west of the Opera House for a performing arts center. Subsequent to its creation the Committee caused a feasibility study of such a center to be made, the



Mr. Robert J. Dolan

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March 9, 1973

cost of which was financed by a gift of \$15,000 to the City and County by the Zellerbach Family Fund and accepted on behalf of the City and County by the Board of Supervisors. (Res. No. 119-71, adopted Mar. 8, 1971, approved Mar. 11, 1971.) The feasibility study was submitted to the Committee in November, 1971, and since that time it is my understanding that the Committee has been and is continuing to review and evaluate the various proposals set forth in the study. In August 1972 the Board of Supervisors accepted a gift of \$11,250 from the Zellerbach Family Fund to the City and County for the purpose of compensating the Assistant to the Executive Director of the San Francisco Committee for the Performing Arts Center, (Res. No. 490-72, adopted Aug. 7, 1972, approved Aug. 9, 1972) and a gift of \$471 from the same donor to cover additional expenses incurred by the Committee in connection with the feasibility study (Res. 527-72, adopted Aug. 25, 1972, approved Aug. 25, 1972.) On October 2, 1972, pursuant to the provisions of Section 3.100 of the Charter, the Mayor transmitted his annual report to the Board of Supervisors in which he included a recommendation that San Francisco should commit itself to the construction of a new Center for the Performing Arts and suggested a method of funding the construction thereof.

The construction of such a facility by the City and County is unquestionably a public purpose. (Futterer v. Sacramento, 196 Cal. 248.) Granting that the power to construct such a facility exists, the power to study the feasibility of constructing such a facility and to review and evaluate such a feasibility study follows as a necessary incident. (Kennedy v. Ross, 28 Cal.2d 569, 580.) Accordingly, it is my opinion that the San Francisco Committee for the Performing Arts Center in conducting such activities is serving a valid municipal purpose, and the acceptance by the Board of Supervisors of gifts and donations to defray the expenses incurred by the Committee in conducting such activities is authorized by the provisions of Sections 1.101 and 2.101 of the Charter.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



March 12, 1973

Mr. E. V. De La Torre  
Weeks-Howe-Emerson Co.  
645 Howard Street  
San Francisco, California 94105

Subject: Subjection to Provisions of Electrical  
Code by Sale of Single Electrical Item

Dear Mr. De La Torre:

This is in reply to your letter of February 22, 1973, as to whether your firm is subject to Article 1, Division G of the Electrical Code of the City and County of San Francisco because of the sale of a single item of battery chargers.

Section 79, Electrical Sales Permit Fee, is the controlling section of Article 1, Division G, in the discussion of this matter. Section 79 states in part:

"SECTION 79. ELECTRICAL SALES PERMIT FEE.  
Every person, firm or corporation before leasing, renting, selling, exposing for sale or offering for sale as a premium or gift, any electrical material, device, appliance, fitting or equipment described in Section 71, operated or energized with electricity designed for attachment to or installation in or on any electrical circuit or system shall pay an annual fee of \$25.00.

"EXCEPTIONS:

"No Electrical Sales Permit Fee shall be charged:

"1. Persons, firms or corporations selling light globes but no other electrical devices;





Mr. E. V. De La Torre

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- "2. Persons selling electrical material designed for and to be used exclusively on motor propelled vehicles, and who sell no other electrical material;
- "3. State licensed electrical contractors and state licensed specialty contractors selling electrical material which is to be used by them in the installation of electrical systems or component parts thereof in regard to such material shall not be subject to the provisions of this Division. . . ."

Section 79 is very clear in its intent and in its exceptions and the item in question, a battery charger, is not one of the exceptions.

The Electrical Code does not provide an exception for firms selling a limited selection of electrical items or even a single item. Consequently, Weeks-Howe-Emerson Company is not exempt from the requirement of maintaining an electrical sales permit.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



March 12, 1973

Donald M. Scott, Chief  
San Francisco Police Department  
850 Bryant Street  
San Francisco, California 94103

Dear Chief Scott:

I have reviewed the proposed rule additions and the waiver form set forth in your March 9, 1973, letter and I have the following suggestions with respect to the proposed rules:

3.06.1 - Substitute the words "a member under consideration for suspension" for the words "suspended member" as they presently appear in the proposed rule.

3.06.2 - Amend this proposed rule to read as follows:

"Should the member accept the option of working without pay as set forth in Section 3.06.1, there shall be no right of appeal before the Police Commission."

With respect to the waiver form, I suggest the addition of the following language at the end of the first paragraph:

"and freely and voluntarily waives his right to pay for such period."

I would also suggest that the second paragraph be amended to read as follows:

"I recognize and understand that if a suspension were imposed by the Chief of Police, I would have the right to appeal such suspension to the Police Commission under the provisions of Section 8.343 of the Charter and Rule 3.06 of the Rules and Procedures of the San Francisco Police Department



Donald M. Scott, Chief

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and that in voluntarily agreeing to work \_\_\_\_\_  
days without pay in lieu of such suspension I am  
freely and voluntarily foregoing such right of  
appeal."

In my opinion, the proposed rules and waiver will be legal if the Chief of Police has determined in the particular case that there has been a violation of the rules and regulations of the department which warrants a suspension and if the consent of the officer has been freely and voluntarily given with a full recognition of his legal rights under the Charter and under the rules and procedures of the department. (See City Attorney's Opinion No. 72-13, dated March 10, 1972.)

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



March 13, 1973

Assessment Appeals Board  
Room 2-B, City Hall  
San Francisco, California 94102

Subject: In The Matter of Xerox Corporation,  
Petition No. 1373

Gentlemen:

This letter is in reply to the Memorandum of Points and Authorities submitted by Xerox Corporation at the conclusion of the hearing on the above-referenced matter on March 8, 1973, and addresses itself specifically to two points:

1. Xerox contends that "list price" is no evidence of full cash value and states as follows on Page 2, lines 20-27 of its memorandum:

"Thus, there was no evidence that the list price is what the property would bring if exposed for 'sale' as required by Rev. & Tax. Code §110. The machines subject to assessment were leased, not sold, although the lessee had the alternative of buying. By deciding to lease all the lessees rejected the purchase price, indicating that the list price did not produce any buyers in San Francisco County, and hence could not be fair value."

No substantial evidence was offered by Xerox that actual rents were economic. If actual rents were low, as the Assessor contended, then there would be no incentive to purchase copier machines.

2. Xerox contends that the capitalization of sales tax to the base price of the copier machines is erroneous. It is apparent that Xerox's position is predicated on the California Sales Tax being a tax





upon the buyer at the time the transaction is consummated. The Assessor has cited and relied upon Livingston Rock Gravel Co. v. De Salvo, 136 C.A.2d 156 (1955) with respect to the nature of the California Sales Tax. The Livingston case states in pertinent part as follows:

"A sales tax is an excise and privilege tax levied on a retailer for the privilege of selling tangible personal property." [p. 160.]

"The law imposes the fixed rate of the tax on gross receipts and not on the individual sale of tangible personal property." [p. 160.]

"It has uniformly and consistently been held that the sales tax is laid solely on the retailer and not on the consumer. The tax relationship is between the retailer only and the state; and is a direct obligation of the former." [p. 160.]

"A retailer may 'pass on' the tax to a buyer with the latter's consent thereto either expressly or impliedly given. In the absence of either the express or implied consent of the buyer that he will assume the burden of paying the tax, he is under no legal liability to do so." [p. 161.]

The price for which a copier machine would change hands is the total value of the consideration paid. The consideration that an end-user would have to pay in order to purchase a copier machine from Xerox would be the cost or its equivalent in kind to Xerox plus relieving Xerox of its obligation or debt to the state for the privilege of engaging in the retail sale of tangible personal property in California. The total consideration represents the price the seller is willing to sell and the price a buyer is willing to buy and is consistent with Revenue & Taxation Code, Section 110, and Rule No. 2 of the State Board of Equalization. The seller has received two kinds of consideration, money or its equivalent in kind, and, additionally, payment by the buyer of a debt owed the state by the seller.



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Xerox cites Davis v. United States, 460 F.2d 769 (1972), for the proposition that a sales tax adds nothing to value. The Davis case involved the valuation of mutual funds for Federal Estate Tax purposes where a "sales load" or sales commission had been imposed upon the buyer at the time of purchase. The Davis case is not apposite for purposes of this equalization hearing, because, as Davis points out, the "sales load" is a charge for service which is paid by the buyer at purchase and never recovered, and that the redemption market (and not the initial purchase market) is the market upon which both parties agree when the shares are purchased. The public buys shares in the fund fully apprised of its redemption opportunities through company prospectuses.

For the foregoing reasons, Xerox's contentions are not well taken and, accordingly, should be rejected by this Board.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



March 15, 1973

Mr. Emmery Mihaly  
Registrar of Voters  
155 City Hall  
San Francisco, California 94102

Subject: Initiative Charter Amendment re Supervisorial  
Districts; Calling Election in Connection Therewith

Dear Mr. Mihaly:

This is in response to your letter of February 16, 1973, relating to the above-captioned subject, wherein you request my opinion as follows:

1. Assuming that sufficient signatures are obtained by the proponents of the attached initiative measure, is the responsibility of calling a special election that of the Registrar, in which instance it would be ministerial and mandatory, or does the responsibility of calling a special election belong to the Board of Supervisors;
2. What constitutes a sufficient percentage of valid signatures of registered voters to qualify the attached initiative measure for a special election:
  - a. 10% as specified by Sec. 9.111 of the Charter; or
  - b. 15% as specified by Sec. 34459 of the Government Code.

Section 9.111 of the Charter provides that if the petition accompanying a proposed initiative measure be signed by 10 percent of the registered voters and contains a request that said measure be submitted forthwith to a vote of the electorate at a special election, then the Registrar shall forthwith call a special election.

Section 34459 of the Government Code provides, in part, that the Charter of any city or city and county may be amended by proposals submitted by petition signed by 15 percent of the





Mr. Emmery Mihaly

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registered electors and that any such proposal shall be submitted to the electors at either a special election called for that purpose or at any general or special election. Section 34461 of the Government Code provides, in part, that the governing body of the city or city and county shall submit any proposed charter amendment to the electors.

Thus, there appears to be a direct conflict between the Charter and general law as to the number of signatures necessary for an initiative charter amendment and as to the person or body upon whom the responsibility falls for calling an election upon any such initiative charter amendment, if it qualifies for the ballot.

Sections 34450-34463 were added to the Government Code by the State Legislature in 1969, to become operative on June 2, 1970, if Assembly Constitutional Amendment No. 29 of the 1969 Regular Session was adopted by the people. (Stats. 1969, ch. 1264, §§3 and 4, pp. 2475-77.) Assembly Constitutional Amendment No. 29 of the 1969 Regular Session appeared on the June 1970 ballot as a revision of Article XI of the California Constitution relating to local government. In the detailed analysis of the proposed constitutional amendment by the Legislative Counsel as it appeared in the voters' pamphlet for the election, the following statement appears:

"This measure would revise Article XI of the California Constitution. The revision would retain some existing provisions without change and would restate other provisions, some with and some without substantive change. In addition, certain existing provisions would be deleted from the Constitution, thus placing the subject matter of the deleted provisions from then on under legislative control through the enactment of statutes. Chapter 1264 of the Statutes of 1969 is such a statute. It will take effect if this measure is adopted."  
(Emphasis added.)

The analysis of the Legislative Counsel finds support in the provisions of Sections 2(a) and 13 of Article XI as amended. Section 2(a) empowers the Legislature to provide for city powers and Section 13 provides, in part, that the provisions of Sections 3(a) and 5 of Article XI "relating to matters affecting the distribution of powers between the Legislature and cities, including matters affecting supersession, shall be construed as a restatement of all related





Mr. Emmery Mihaly

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provisions of the Constitution in effect immediately prior to the effective date of this amendment, and as making no substantive change."

It is well established that the procedure provided by Article XI of the State Constitution in effect prior to June 2, 1970, for amending city charters was exclusive, and any charter provision in conflict therewith was invalid. (Uhl v. Collins, 217 Cal. 1; Marsh v. Hall, 217 Cal. 787; Alexander v. Mitchell, 119 Cal.App.2d 816.)

Additional support for the analysis of the Legislative Counsel is to be found in S.B. 967 which was enacted in 1972 and effective March 7, 1973. (1972 Stats. ch. 409, p. \_\_\_\_). S.B. 967 amends Section 4085 of the Elections Code, which section describes a form of petition for the amendments of city and county charters and provides that petitions shall be substantially in that form. The statutory form, as amended by S.B. 967, recites, inter alia, that the petition is presented "Pursuant to . . . Chapter 3 of Division 2 of Title 4, commencing at Section 34450 of the Government Code." (Emphasis added.)

In view of the foregoing, it is my opinion that the provisions of general law as set forth in Sections 34450-34463 of the Government Code are controlling in the present instance.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



March 15, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Initiative Charter Amendment Re District  
Election of Supervisors; Analysis Thereof

Dear Mr. Dolan:

This is in response to your letter of February 16, 1973, relating to the above-captioned subject. You advise that a review of the contents of the measure indicates the possibility that the proposed district boundaries will not necessarily accomplish the equal population representation sought, that the requirement for residence in a supervisorial district may not be legally enforceable, and that the text may not be clear and unambiguous in certain respects so that implementation of the measure would be feasible if it were to be approved by the voters.

In addition, you advise that Supervisor Terry A. Francois has requested a legal analysis of the measure to determine whether any possible inconsistency, conflict or complication exists with respect to provisions applicable to the San Francisco Unified School District and the San Francisco Community College District. Supervisor Francois has also requested my opinion as to whether or not the proposed initiative measure is sufficient in all respects to serve as an authoritative guide for the election of supervisors and my advice as to any substantial illegalities inherent in the proposed measure.

The proposed initiative petition is identical to the petition you referred to this office in 1972 and does not incorporate the amendment I made to the said petition as herein-after described.

The proposed initiative charter amendment petition (hereinafter referred to as "petition") is addressed to the Registrar of Voters of the City and County of San Francisco and after



Mr. Robert J. Dolan, Clerk

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reciting that said petition is being presented pursuant to Sections 179-182 of the City Charter and Section 3 of Article XI of the State Constitution, goes on to request that the proposed amendments be submitted forthwith to the electors of the City and County at a special election.

The format of the proposed amendment set forth in the petition follows the format provided for in Section 2.24 of the Administrative Code in that additions or substitutions for existing Charter language are printed in bold-face type, and deletions of existing Charter language are enclosed in double parentheses and an appropriate notation explanatory of the types used in the proposal precedes the text thereof.

The proposed amendments contained in the petition amend Section 5 (now §9.100) and Section 10 (now §§2.100, 2.200, 2.201 and 2.202) of the Charter. Section 5 would be amended by adding language thereto providing, in general, for shortening the term of the six supervisors elected in 1971 from four years to two years with a proviso that if there is not sufficient time to implement this provision in 1973, then it shall be applicable with respect to the five supervisors to be elected in 1973. There is no indication by way of bold-face type or double parentheses of any other proposed changes in the existing Charter language of former Section 5. However, when, in 1971, Section 5 was recodified as Section 9.100, it was also amended to add language providing for the election at large of the members of the Board of Education and for the times at which and the terms for which said members would be elected. The language added to Section 5 in 1971 does not appear in Section 5 of the petition. Section 10 would be amended by substituting the words "by districts" for the words "at large" in the first sentence of Section 10 (now §2.100) and by adding language providing for the election of supervisors by district commencing in 1973, describing and setting out the boundaries of the eleven supervisorial districts, establishing a one-year residence requirement for district supervisors, requiring continuous residence during incumbency, and providing for removal from office in the event a supervisor ceased to be a resident of his district. Provision is also made for staggering the terms of supervisors, and for redrawing district boundaries following each dicennial census in accordance with, and subject to, applicable law. Finally, provision is made that if the amendment is not effective in time to be carried out at the 1973 election, then the provisions shall be effective in 1975.





Mr. Robert J. Dolan, Clerk

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With respect to the contents of the petition, I would agree that it is possible that the proposed district boundaries may not necessarily accomplish the equal population representation sought. However, if there is any such failure, it is not apparent upon the face of the petition and, accordingly, the petition must be presumed valid in this respect until any invalidity is made to appear. (45 Cal.Jur.2d, §115, p. 624.)

The observation that the requirement for residence in a supervisorial district may not be legally enforceable also merits some discussion in view of the number of recent court decisions dealing with this issue. A three-year residence requirement has been struck down (Camara v. Mellon (1971) 4 Cal.3d 714), as has a five-year residence requirement (Zeilenga v. Nelson (1971) 4 Cal.3d 716). On the other hand, one-year residence requirements have been sustained. (Gage v. Allison (1971) 22 Cal.App.3d 85; Wenke v. Hitchcock (1972) 6 Cal.3d 746.) Since the petition herein would establish a one-year residence requirement, it appears that it would be legally enforceable.

With reference to the request of Supervisor Francois as noted above, I have reviewed the petition and find that it is identical to the petition you referred to this office in June 1972, with a request that I prepare legislation reflecting the intent of said petition for public hearing by the Legislative and Personnel Committee of your Board. (File No. 354-72.) In drafting such legislation and in order to correct any possible inconsistency, conflict or complication with other Charter provisions and to submit a measure which would be sufficient to serve as a guide for the election of supervisors, I made the following changes or additions:

(1.) Section 5 of the petition was renumbered as Section 9.100 and Section 10 thereof was renumbered as Section 2.100 to conform to the recodified Charter.

(2.) Provision was added to the petition to indicate that the supervisorial districts would also be used for purposes of recalling any supervisor elected by district and for the appointment to any vacancy in office during a term.

(3.) Provision was added to the petition to indicate that any change in district boundaries as required after each decennial census would not operate to terminate the term of any member until the normal expiration of his term of office.





Mr. Robert J. Dolan, Clerk 4

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(4.) Provisions added to Section 5 at the November 1971 election (Proposition "S") relating to the times at which and the terms for which members of the Board of Education are to be elected were added to the petition.

(5.) Provisions were added to the petition that certain provisions of Sections 9.104, 9.105, 9.108 and 9.111 of the Charter, relating to elections, would not be applicable to the petition and requiring the Board to make provision for the same by ordinance. In general, the following provisions of the following sections would not be applicable:

(a) The provisions of Section 9.104 relating to the manner of placing the names of candidates on the ballot.

(b) The provisions of Section 9.105 relating to the mailing of a copy of the statement of qualifications of each candidate for an elective office to each voter in the City and County.

(c) The provisions of Sections 9.108 and 9.111 relating to the recall of elective officers.

All of the foregoing provisions relate to an election at large and can be made applicable thereto, but would cause unnecessary complication, confusion and expense if applied to a district election such as is contemplated herein.

My review of the present petition indicates that the aforesaid inconsistencies, conflicts and complications still exist therein and, to the extent indicated hereinabove, that the petition is not sufficient to serve as an authoritative guide for the election of supervisors. The omission in the petition of the provisions added to Section 5 with respect to the times at which and the terms for which the members of the Board of Education are to be elected raises a serious question as to whether or not such omission constitutes a repeal of such provisions and the consequences of such repeal, if indeed it is. While it is well established that repeals by implication are not favored in the law, it is also well established that a statute may be repealed by implication. (45 Cal.Jur.2d, §§77, 79.) An amending act is said to be intended as a substitute for the original, continuing in force that which is re-enacted and repealing that which is omitted. (Pierce v. Solano County, 62 Cal.App. 465.) On the other hand, it has been held that the omission of language added to a statute by a bill passed early



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in a legislative session from a bill amending the same statute and passed later in the same legislative session could be classified as a case of inadvertent inconsistency and did not repeal the earlier enactment. (People v. Williams, 124 Cal.App.2d 32; 19 Ops. Cal. Atty. Gen. 104.) In my opinion, the rule of the Williams case, supra, would be of little value in the present instance, since here an amendment being presented in 1973 omits language added some two years previous and it would appear that the legislative body herein; i.e., the voters of San Francisco, have or presumably will have knowledge of such omission at the time of voting on the petition. (See also my Letter Opinion No. 71-24 of April 27, 1971, concerning immateriality of claims and statements of proponents as to intent and meaning of an initiative measure.)

The problem with respect to the provisions of the Charter applicable to the Unified School District would arise as follows: the provisions of the Charter applicable to the Unified School District are set forth in Section 5.100 (formerly §134) and Section 9.100 (formerly §5) of the Charter. Section 5.100 provides, in part, that the School District of the City and County shall be governed by a Board of Education, composed of seven members, to be elected at large by the voters of the City and County, and to be subject to recall, suspension and dismissal in the same manner as elective officers. Section 9.100 provides, in part, for the times at which and the terms for which said school board members are to be elected; viz., at the general election in each even-numbered year for four year terms commencing on January 8th following the date of their election.

As pointed out hereinabove, the provisions of Section 9.100 with respect to the times at which and the terms for which the members of the school board shall be elected do not appear in the text of the petition. If the rule of repeal by implication is applicable, there would then be no provision in the Charter establishing the times at which or the terms for which members of the school board are to be elected. If such were the case, the provisions of Section 1201 of the Education Code would be applicable. Section 1201 provides, in part, that if the Charter of a city and county fails to provide for all or any of the matters specified in Section 1223 of the Education Code, then Sections 914, 1102, 1105, 1111, 1119, 1131, 1161 and 1162 shall apply as to the matters not provided for in the Charter. The matters specified in Section 1223 of the Education Code include "the times for which, or the terms for which the members of the . . . board of education shall be elected." A review of the sections enumerated in Section 1201 of the Education Code





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indicates that Sections 1111 and 1119 of the Education Code cover matters which would not be provided for by the Charter. Section 1111 provides that a governing board member election shall be held biennially on the third Tuesday in April in each succeeding odd-numbered year to fill the office of those members whose terms expire on June 30th next succeeding the election. Section 1119 provides that the term of office of a school board member shall be four years from July 1st next succeeding his election. This result would complicate the election process in the City and County in that it would require the holding of an additional election in April in each odd-numbered year to elect members of the Board of Education.

The failure to include provisions in the petition for the conduct of district elections or exemption from the provisions of the Charter as set forth in (5.) above, or for recall of district supervisors or for the effect that any change in district boundaries might have on incumbent supervisors, impairs the value of the petition as an authoritative guide for the election of supervisors and would be a source of endless litigation.

I have also reviewed the petition with respect to any basis for challenges as to legality inherent therein and, while I find some possible illegalities, the only one which appears substantial in nature concerns omissions from Section 5 heretofore discussed.

For example, Elections Code Section 4085 describes a form of petition for initiative Charter amendments and provides that said petition shall be in such form. The statutory form is addressed to the city council (or other legislative body) of the city (or city and county), recites, in part, that the undersigned petitioners are presenting the petition pursuant to: ". . . Chapter 3 of Division 2 of Title 4, commencing at Section 34450 of the Government Code . . .," and concludes with a request that the proposed amendment be submitted to the electors: "at an election on a date to be determined by the City Council (or other legislative body)." The petition herein differs from the statutory form in that it is addressed to the Registrar of Voters, makes reference to Sections 179-182 of the Charter rather than to the sections of the Government Code, and concludes with a request that the proposed amendment be submitted forthwith to the electors at a special election.

In a somewhat similar situation, the Attorney General advised that a request for submission of an initiative Charter amendment at a special election is to be treated as empty surplusage, signifying nothing and thus not a substantial violation



Mr. Robert J. Dolan, Clerk

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of Elections Code Section 4085. (21 Ops. Cal. Atty. Gen. 53, 58.) I would concur in the conclusion of the Attorney General in that the discrepancies in the petition herein may be disregarded with respect to the time of the election herein.

A second possible basis is the erroneous numbering of the Charter sections proposed to be amended by the petition. The petition designates the Charter section dealing with the subject of elective officers and terms as Section 5 and the Charter section dealing with the number, districts, compensation and meetings of supervisors as Section 10. As pointed out hereinabove, Section 5 is now Section 9.100 and Section 10 is now part of Sections 2.100, 2.200, 2.201 and 2.202. However, it has been held that erroneous numbering will not affect the operation of the law if the intent of the lawmakers can be ascertained. (People v. King, 28 Cal. 265, 274; 21 Ops. Cal. Atty. Gen. 53, 59.) In the present instance, I believe the intent of the lawmakers is ascertainable; viz., to amend those provisions of the Charter dealing with the subject of elective officers and terms, and the subject of the number, compensation and meetings of supervisors and their error in designating the section numbers relating to such subject matter would not vitiate the petition. Even though it might create editorial problems, the sections set forth in the petition and their recodified counterparts may dwell side by side in the Charter, subject to interpretation in accordance with the provisions of applicable law. (21 Ops. Cal. Atty. Gen. 53, 59.)

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





January 12, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Acquisition of S.P.C.A. Site for  
a City Operated Public Pound

Dear Mr. Dolan:

You recently wrote requesting my opinion as to whether or not the City could acquire the current dog pound from the S.P.C.A. by the use of eminent domain for the purpose of establishing and operating a City-owned dog pound.

Eminent domain is the right of the people or government to take private property for public use. C.C.P. Section 1237. The right of eminent domain may be exercised to acquire private property for any use authorized by the Legislature of the State of California. C.C.P. Section 1238(2).

Government Code Section 25302 provides that the Board of Supervisors may maintain, regulate and govern public pounds. The Legislature, having given the Board of Supervisors authority to maintain a public pound, the County may acquire the necessary facilities for this purpose by the use of eminent domain.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



March 20, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: File No. 21-72-1. Television Signal  
Corporation Request for Refund of  
1971-72 Personal Property Tax

Dear Mr. Dolan:

In regard to the above referenced request for refund, it is the opinion of this office that a refund is legally proper. Enclosed please find a copy of the appropriate implementing resolution. The original resolution and copies have been forwarded to the assessor and controller for review and signature.

Claimant, Television Signal Corporation, has requested refund of taxes assessed and paid on that part of its cable television system which is permanently fixed inside the houses of subscribers. This portion of the cable system is referred to as the "house drop." Two recent court decisions make clear that the house drop becomes the property of a subscriber upon installation. Because claimant is assessed by the City and County of San Francisco on the basis of cash value of property owned by claimant, the house drops were improperly included in the assessment. Tele-Vue Systems, Inc. v. County of Contra Costa (1972) 25 C.A.2d 340, Tele-Vue Systems, Inc. v. County of Sonoma (1970) Superior Court Sonoma 62038.

The San Francisco Assessor has determined not to assess "house drops" for years subsequent to 1972, thus in effect recognizing the validity of the instant claim.

Although claimant requests a refund of \$15,618.35, the attached copy of Mr. Tinney's letter of August 18, 1972 indicates that a refund of \$10,807.38 is proper, and the enclosed resolution has been so drafted. Claimant's attorney, Mr. Joseph B. Harvey, has, by letter, agreed to the correctness of the Assessor's figure.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



March 20, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: File No. 490-72-2  
File No. 490-72-1  
Legislation Regarding Destruction of  
Private or Public Property Resulting  
From Demonstrations or Parades

Dear Mr. Dolan:

This is a joint response to your letter of December 18, 1972 (File No. 490-72-2) requesting legislation, if constitutionally permissible, that would guarantee the right of free and peaceful assembly and at the same time protect public and private property from destruction, and to your January 18, 1973 letter (File No. 490-72-1) inquiring into the constitutionality of an ordinance requiring applicants for parade permits to post a bond to cover any damage to persons or property reasonably related to such parade.

Destructive acts by demonstrators are not constitutionally protected and there are sufficient State statutes providing punishment for such acts, mainly, depending on the circumstances of the particular case, those sections of the Penal Code denouncing as crimes and making punishable trespass, unlawful assembly, the malicious, wrongful or wilful destruction or damaging of property, disturbing or breaching the peace and engaging in or inciting to riot. However, assemblies or demonstrations involving the exercise of the constitutional rights of freedom of speech and of assembly may not be suppressed on the basis that they may result in disturbances, disorderly conduct or riots with concomitant damage to public or private property. The case of Hague v. Committee for Industrial Organization, 307 U.S. 496 involved the constitutionality of an ordinance which required a permit for a public parade or a public assembly in or upon the streets, highways or public buildings of Jersey City and which authorized the Director of Public Safety to refuse the permit when it was for the purpose of preventing riots, disturbances or disorderly assemblage. The Supreme



Mr. Robert J. Dolan

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Court of the U. S. held that the ordinance constituted an unlawful infringement of the constitutional rights of freedom of speech and of assembly and that the ordinance was unconstitutional and void on its face. Justice Roberts in the course of his opinion in the case pointed out as follows, p. 516:

"We think the court below was right in holding the ordinance quoted in Note 1 void upon its face. It does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.' It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly 'prevent' such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right."

The City of Birmingham, Alabama, enacted an ordinance which required a permit for the holding of parades, processions and demonstrations on the streets or other public ways of the city if, in the judgment of the City Commission, inter alia, the public peace, safety or good order required that it be refused. The Supreme Court of the State of Alabama sustained the ordinance on the basis of its construction that the ordinance would not allow the refusal of a permit solely on the ground that the activities conducted under the permit might tend to provoke disorderly conduct. However, the Supreme Court of the U. S. in the case of Shuttleworth v. Birmingham, 394 U.S. 147 reversed, holding that the ordinance was not only susceptible of the unconstitutional construction and application rejected by the Alabama Supreme Court but other unconstitutional constructions and applications as well and that the ordinance was void as constituting an unlawful prior restraint on the First Amendment freedoms of speech and of assembly. (Also see: Tinker v. Des Moines Community School District, 393 U.S. 503; Wolin v. Port of New York Authority, 392 F.2d 83; City Attorney's Opinion No. 72-104, dated October 25, 1972.)

In my judgment, no ordinance could be legally drafted that would avoid the constitutional objections pronounced in the foregoing cases and still achieve the objectives of the Fire, Safety and Police Committee as set forth in your December 18, 1972 letter.

The rationale of the cases above cited and the constitutional objections pronounced therein would be equally applicable to the bonding requirement for a parade proposed in your January 18, 1973 letter. In the case of Cox v. State of New Hampshire,







Mr. Robert J. Dolan

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312 U.S. 569, the Supreme Court held that a statute requiring persons using the public streets for a parade or procession to procure a special license and to pay a fee therefor was not an unconstitutional abridgment of the rights of assembly or freedom of speech where, as the statute was construed by the State courts, the licensing authorities were strictly limited in the issuance of the licenses to a consideration of the time, place and manner of the parade or procession with a view of affording an opportunity to provide proper policing and where the license fee ranging from a nominal sum to \$300.00 was intended merely to meet the public expenses necessarily to be incurred in connection with the parade and was to be determined according to the size of such parade or procession. In sustaining the public right, the Court thus strictly limited it. The Court noted that such a licensing statute had to be free from constitutionally impermissible considerations and the Court then distinguished the case of Hague v. Committee for Industrial Organization, supra, which, it stated, did not make comfort or convenience in the use of the streets the standards of official action but was based on the constitutionally impermissible considerations of official opinion as to the prevention of riots, disturbances or disorderly assemblage. (Also see the California case of Dillon vs. Municipal Court, 4 Cal.3d 860, holding a parade permit ordinance of the City of Seaside unconstitutional on the basis of the limitations expressed in Cox v. State of New Hampshire, supra.)

A bonding requirement that would be sufficient in amount to cover speculative damages to public or private property that may or may not occur from the holding of a parade, aside from the constitutional question of reasonableness that would be present in each case, would unquestionably prove in many cases as much of a deterrent to the holding of a parade as would be the power to prohibit involved in the Hague and Shuttleworth cases, supra. It would thus constitute an unconstitutional prior restraint on the exercise of First Amendment freedoms. Such a restriction on the right cannot, as Mr. Justice Roberts noted, "be made a substitute for the duty to maintain order in connection with the exercise of the right."

You are accordingly advised that you may not, in my opinion, constitutionally enact legislation requiring a bond to cover speculative damage to public or private property as a condition of the holding of a parade.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



March 21, 1973

Mr. Charles R. Mills  
Assistant Curator  
Department of Education  
M. H. De Young Memorial Museum  
Golden Gate Park  
San Francisco, California 94117

Subject: Legality of Operating a Rental,  
Exhibition and Sales Gallery in  
the M. H. De Young Memorial Museum

Dear Mr. Mills:

Currently under construction at the M. H. De Young Memorial Museum is the "A.O.A. Gallery" which will display the Traditional Arts of Africa, Oceania and the Americas (Native American and pre-Columbian). The members of the A.O.A. Gallery Committee, which consists of members of the Museum staff and interested citizens, has proposed that a rental, exhibition and sales space be opened along with the A.O.A. Gallery for the purpose of encouraging Bay Area artists, whose racial roots are represented in the A.O.A. Gallery. You have asked for an opinion as to the legalities involved.

In the absence of a detailed proposal we cannot of course, anticipate every legal question which may arise in the course of establishing such a rental gallery; however, I am of the opinion that there are no major legal obstacles to prevent its formation. After describing in more detail the arrangements which you contemplate, I will discuss a few legal questions which are evident at this stage.

Along with your letter of February 16, 1973 to Mr. Thomas Blanchard of this office, requesting his opinion, you enclosed a working draft which summarized the purpose of the gallery as follows:

"The purpose of this venture would be to give artists, who have been traditionally excluded from major museums, reasons and opportunity



Mr. Charles R. Mills

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to show their work in an established institution. It also will give the museum an opportunity to broaden its community base. This should begin to help people who have for some time supported the arts, realize that there are valid forms of expression that do not find their basis in Western art and let people who do not have their expressive roots in Western art understand the validity of their response patterns."

Three entities will be involved in the operation and success of the rental gallery. The Museum will provide the space for the gallery. The Patron's Society or the Museum Foundation will fund the operation of the gallery, employ necessary staff (the latter in cooperation with the A.O.A. Committee) and oversee the work of volunteer staff which will work in the gallery. The A.O.A. Committee will be responsible for establishing a jurying committee and assisting the entity which operates the gallery in selecting the manager of the rental gallery.

The A.O.A. Committee has an open membership which currently runs at about 30 people. The A.O.A. Committee is to select five members of the jury which will select works for display in the gallery. These five persons are to be of varied racial and artistic backgrounds. In addition, the manager of the rental gallery and one staff person from the de Young Museum will serve on the seven-member jury for selection of works for display.

Under the current proposal there will be a jurying of new works once every three months and any Bay Area artists may submit work for jurying. While the desire is to encourage artists whose racial and ethnic roots are represented in the A.O.A. Gallery, you indicate that no person will be excluded on grounds other than artistic merit.

Finally, the gallery will rent and sell work to any person who either has the cash or the necessary identification to establish credit.

I will now discuss the legal issues raised by your proposal.

1. The first question which comes to mind is whether the use of space in the de Young Museum for a rental gallery which will economically benefit private artists is an appropriate use of public property. In view of the overall purpose of the gallery, as stated above; that is, to broaden the de Young Museum's community base and to educate the community (including the artists) to the validity of art forms not usually found in major museums, a public benefit is established. The fact that the gallery incidentally may bring some economic benefit to private persons does not defeat the public





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benefit which is sufficient to justify establishment of the gallery in the Museum.

2. Under the terms of the current proposal, the manager of the rental gallery will be an employee of either the Patron's Society or the Museum Foundation, and the sales staff will consist of volunteers who answer to either the Patron's Society or the Museum Foundation. If you should amend your proposal so that the gallery is to be operated by Museum personnel, be advised that under Charter Section 6.311 all money received by any officer or employee of the City in connection with the business of the City must be deposited in the treasury immediately, and that money cannot be withdrawn from the treasury except as provided in the Charter. This would complicate your transactions with the artists, of course.

3. Your proposal for selection of a jurying committee essentially by the A.O.A. Committee and then for selection of the works to be displayed in the gallery by the jurying committee raises a delegation of authority problem.

By virtue of his civil service classification, the Director of the Museum is responsible for directing all the activities of the museum. This includes directing and participating in the location and selection of art works for the Museum. It is clear that selection of the jurying committee and selection of art works in the museum falls within the scope of the Director's responsibilities, and that "selection" requires an exercise of the Director's discretion. The general rule is that a public official cannot delegate authority to perform a function where discretion is involved, thus, ultimately, the Director must be responsible for the selection of the jurying committee and selection of art works to be displayed in the Museum.

The fact that the Director of the Museum must make the final decision in selection of the jurying committee and of art works for the Museum does not preclude having another person or group make the initial selection and recommendation in each case, however. Thus, in my opinion, the delegation of authority problem which I see in your draft proposal could be cured by the Director's simply retaining either the right to reject or the right to approve both the jury selected by the A.O.A. Committee and any work selected by the jury for display in the rental gallery.

This has necessarily been a rather general discussion of the legal questions you may encounter as you proceed with developing a rental gallery in the de Young Museum.

I will be happy to discuss these problems or others with you in more depth if you find that desirable.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





March 28, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Authority of Art Commission to Review  
Advertisement Decal Design on Waste  
Receptacles

Dear Mr. Dolan:

This letter is in response to your inquiry of March 15, 1973 regarding the necessity for securing the approval of the Art Commission for designs of advertising decals affixed to waste receptacles. It is my opinion that no such approval need be sought since by its very nature a litter receptacle is portable and movable and therefore outside Art Commission jurisdiction.

Under Section 3.601 of the Charter, the Art Commission has design approval authority over all "buildings, bridges, viaducts, elevated ways, approaches, gates, fences, lamps or other structures erected or to be erected upon land belonging to the City and County . . ." An elementary principle of statutory construction provides that the term "other structures" above is limited by the enumerations before it. Thus "other structures" similar to buildings, elevated ways or lampposts are also within the jurisdiction of the Art Commission. It is clear that what each of the specific structures set out in Section 3.601 has in common with the others is the quality of permanence. Each such structure is "erected" on land owned by the City and County, and in the normal course of events would remain in that one location where erected.

However, litter receptacles are necessarily portable. They must be movable in order to be emptied, and it is conceivable that particular receptacles might be relocated from time to time depending on the needs of certain areas. This is to be contrasted with parking meters, discussed in Opinion 69-99, November 14, 1969, which are fixed permanently in one spot, and the scoreboard at Kezar Stadium discussed in Opinion 65-7A, March 16, 1965, which certainly shares the quality of permanence of the stadium itself.



Mr. Robert J. Dolan

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Therefore, litter receptacles are not "other structures" within the meaning of Section 3.601 of the Charter. It then follows that since the Art Commission has no jurisdiction over the receptacle itself, no approval is necessary for design of advertising decals adhering to it.

In view of the foregoing, you are advised that the Art Commission has no jurisdiction concerning this matter and its prior approval of waste receptacle advertising decal design is not required.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



March 28, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Ordinance Governing Residence Requirements  
For Officers and Employees; Legality of  
Premium Pay for Employees who are Residents  
of City and County of San Francisco

Dear Mr. Dolan:

You have transmitted to us the request of the Legislative and Personnel Committee that Section 16.103 of the Administrative Code be amended in various particulars. The enclosed draft incorporates those of the suggested amendments which we believe can appropriately be included in the ordinance, while omitting those suggested amendments which, as will be discussed below, we believe are covered by existing code provisions or can be accomplished administratively.

1. We have deleted the reference to "grave medical information" and have provided, instead, that authority to live outside the City and County may be granted where it is determined that an "officer or employee or a member of his immediate family suffers from a condition of ill health which necessitates that such [person] live outside the city and county as a means of eliminating or substantially ameliorating such condition of ill health."

2. With respect to the policing of this legislation, we believe that no amendment of Section 16.103 is required. The section now provides for medical reexamination at least every two years with authority to demand reexamination at shorter intervals as deemed necessary.

3. We do not believe it feasible to attempt to delineate "short-term" illnesses. The section as now written adequately covers this area. There is authority to require such medical examinations as are deemed "reasonable to determine the continued existence of such authorization." Consequently, at the time authorization



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to reside outside the City and County is granted, it may also be determined when reexamination should take place as indicated by the nature and extent of the health condition which forms the basis for the request to reside outside the City and County.

4. You requested our advice as to providing premium pay for employees who live in the City and County. It is our opinion that payment of such premium pay would be illegal. Initially, the Charter requires with respect to employees subject to salary standardization that "like compensation shall be paid for like service." (Charter, Section 8.401.) The rates of pay for craft employees and members of the Police and Fire Departments are to be established in accordance with collective bargaining agreements and rates of pay paid in other jurisdictions and the Charter does not allow for any differential as to such employees based upon whether they reside in the City and County. Secondly, it would appear that the payment of different rates of pay to employees solely on the basis of their place of residence would be unconstitutional. (See County of Alameda v. City and County of San Francisco 19 C.A.3d 750.)

5. The enclosed draft places with the Retirement Board the responsibility for determining whether an employee should be granted authority to live outside the City and County on the basis of a condition of ill health.

6. There does not appear to be any necessity for providing a specific penalty for persons who move out of the City and County without approval. Section 16.99 requires, with certain specified exceptions, that

"... all persons appointed to offices or employments in the city and county service shall continue to be, or shall become and remain, residents of the city and county during the incumbency of their office or period of employment."

Any person who fails to satisfy this requirement is no longer entitled to hold his particular office or employment with the City and County.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





April 2, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: BARTD Board of Directors; Duty  
of San Francisco Members of  
Said Board to Follow Official  
City and County Policy

Dear Mr. Dolan:

This is in response to your letter of March 27, 1973, wherein you request my opinion as to whether or not the San Francisco directors on the Bay Area Rapid Transit District have a duty, as a matter of law, to vote in such multi-county capacity in accordance with San Francisco's officially established policy.

As pointed out in Letter Opinion No. 72-51, dated July 3, 1972, a response to your question calls for an analysis of the legislation creating the San Francisco Bay Area Rapid Transit District. Such analysis reveals the following pertinent information:

The San Francisco Bay Area Rapid Transit District was created directly by the State Legislature in 1957, (Stats. 1957, ch. 1056, p. 2291; Public Utilities Code, Secs. 28500 et seq.) "in furtherance of the declared policy of the State to stimulate the maximum use of the harbor in San Francisco Bay in order to foster and develop international and other trade for the benefit of the entire State." (Public Utilities Code, Sec. 28501.) The Legislature further provided that the legislation "be liberally construed to carry out the objects and purposes and the declared policy of the State of California" as set forth in the Act. (Public Utilities Code, Sec. 28502.) The Board of Directors of the District is the legislative body of the District and, consistent with the provisions of the Act, is empowered to determine all questions of District policy. (Public Utilities Code, Sec. 28762.) In my opinion, the foregoing, coupled with other



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language in the Act, clearly shows that the District was created to serve a statewide interest, and in the conduct of District business, the members of the Board of Directors owe their undivided allegiance to the people of the entire state. Thus, as pointed out in Letter Opinion No. 72-51, supra, with respect to the Bay Area Air Pollution Control District, each San Francisco director on the San Francisco Bay Area Rapid Transit District Board has a duty, as a matter of law, to vote in such capacity in accordance with his best judgment as to what would best serve the interest of the people of the entire state, even though such vote may not at all times be in accordance with the officially established policy of the City and County of San Francisco.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



April 2, 1973

Mr. Bernard Orsi  
General Manager, Personnel  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Whether Civil Service Commission Has  
Authority to Hear a Complaint of  
Unfair Employment Practices Under the  
Civil Rights Act After the Ordinary  
Protest Period Has Expired

Dear Mr. Orsi:

This is in response to your request for opinion whether or not the Civil Service Commission can hear an appeal after the time provided by its rules on complaints relating to violation of the Civil Rights Act or California State Employment Practices Act.

The Civil Rights Act of 1870 (Title 42 U.S.C. §1981) guarantees equal rights under the law for all persons and the Civil Rights Act of 1871 (Title 42 U.S.C. §1983) gives a right of action to any person who has been deprived of any rights, privileges or immunities secured by the Constitution and laws.

It is a general rule of law that where an administrative remedy is provided by statute, relief must be first sought from that administrative body and this remedy must be exhausted before the courts will act. (Abelleira v. District Court of Appeal, 17 Cal.2d; Humbert v. Castro Valley County Fire Protection District, 214 Cal. App.2d 1.) However, a person who claims employment discrimination and sues under Title 42 U.S.C. §1981 is not first required to exhaust administrative remedies. (See Monroe v. Pape (1961) 365 U.S. 167; Carter v. Gallagher (1971) 452 F.2d 315.)

In 1964 Congress enacted Title VII of the Civil Rights Act of 1964 which expressly provides equal employment opportunity to all persons. (Title 42 U.S.C. §2000e, et seq.) This act makes it an unlawful employment practice for an employer to fail or refuse to hire or to discharge an individual or otherwise to discriminate



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against an individual with respect to his employment because of such individual's race, color, religion, sex or national origin. (Title 42 U.S.C. §2000e-2.) Title VII of the Civil Rights Act was amended in 1972 to make it expressly applicable to public employers. (Title 42 U.S.C. 2000e.)

In the event that an individual claims an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964, as amended, (Title 42 U.S.C. §2000e, et seq.), then such individual must follow the administrative procedure provided in that act. (Title 42 U.S.C. §2000e-5.) That procedure requires an individual to file a complaint with the Equal Employment Opportunity Commission who then conducts an investigation and if it determines that there is reasonable cause to believe that the charge is true, the commission shall endeavor to eliminate the unlawful employment practice by informal methods of conference, conciliation and persuasion. (Title 42 U.S.C. §2000e-5(b).) If the alleged unlawful employment practice occurs in a state which has a law prohibiting the unlawful employment practice, then no charge may be filed with the Equal Employment Opportunity Commission until 60 days after proceedings have been commenced under the state law. (Title 42 U.S.C. §2000e-5(c).) This 60-day referral period is intended to give ample opportunity and incentive for states to resolve their own problems of discrimination.

The State of California has enacted the California Fair Employment Practice Act prohibiting unlawful employment practices. (§1410, et seq., Labor Code.) This act has the purpose of protecting the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, or sex. (§§1411, 1412, Labor Code.) It is applicable to political subdivisions and cities. (§1413, Labor Code.) Any person claiming to be aggrieved because of an unlawful employment practice may file with the State Fair Employment Practice Commission a complaint. (§1422, Labor Code.) After the filing of a complaint, an investigation is conducted by the commission and, where warranted by the evidence, an attempt is made to eliminate the unlawful employment practice; in case of failure to eliminate such practice, a written accusation shall be filed against the employer. (§1423, Labor Code.) A hearing is then held by the commission (§1424, Labor Code) and its order or decision is subject to judicial review (§1428, Labor Code). This state procedure must be followed prior to filing a charge with the Equal Employment Opportunity Commission established under Title VII of the Civil Rights Act of 1964, as amended. (Title 42 U.S.C. §2000e-5(c).)

The specific remedies enacted by Congress in Title VII of the Civil Rights Act of 1964 does not preempt the general remedies provided by 42 U.S.C. §1981 and thus, an individual who claims employment discrimination has alternative remedies under either





Mr. Bernard Orsi

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42 U.S.C. §1981 or under Title VII of the Civil Rights Act of 1964. (Johnson v. City of Cincinnati (1971) 450 F.2d 796; Caldwell v. National Brewing Co. (1971) 443 F.2d 1044; Young v. International Telephone and Telegraph Co. (1971) 438 F.2d 757.)

In summary, an individual who claims unlawful employment practices can file suit in federal court under the Civil Rights Act of 1870-71 (Title 42 U.S.C. 1981, 1983) without first exhausting administrative remedies before the Civil Service Commission; or such person may file a charge with the Equal Employment Opportunity Commission pursuant to Title VII of the Civil Rights Act of 1964, as amended, after first having filed a complaint with the California Fair Employment Practice Commission. In the latter instance, a person claiming to be aggrieved by a violation of Title VII of the Civil Rights Act of 1964 may not maintain a suit for redress in federal court until he has first unsuccessfully pursued the specified administrative remedies (42 U.S.C. §2000e-5(f); Love v. Pullman Co. (1972) 404 U.S. 522.) Since the purpose of the administrative remedies is to permit the employer to voluntarily correct any discriminatory employment practices, the Civil Service Commission should entertain and consider a charge of alleged unfair employment practices at any time even though Civil Service Commission rules do not specifically provide for such consideration. In this manner, if the charge is valid, the Civil Service Commission can voluntarily correct the unfair employment practice without the necessity of administrative or legal action.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



April 5, 1973

Colonel Charles Roberts  
Executive Director  
Bay Conservation & Development Commission  
30 Van Ness Avenue  
San Francisco, California

Subject: Application #4-73. Extension of Approach  
Light Trestle Runway 28, San Francisco  
International Airport

Dear Colonel Roberts:

Your staff has requested that the San Francisco International Airport clarify its position in connection with the subject project and its compliance with the California Environmental Quality Act.

It is our position that the Environmental Impact Statement prepared in connection with the Application for Request for Aid No. 5, under the Federal Airport Development Aid Program, in which the project was considered to have no probable adverse impact on the environment, having been processed under the then existing State law, satisfies the requirements of the present law under the provisions of Section 2117.25 of the Public Resources Code.

The following information provides you with the basis for our conclusion:

Notice of Intent to apply for assistance under the Airport Development Aid Program (ADAP) was forwarded to the State Clearing House on September 18, 1972, together with a copy of the Environmental Impact Statement (EIS) which accompanied ADAP Application for Request for Aid No. 5.

Under the then applicable provisions of the California Environmental Quality Act of 1970, environmental impact reports of local governmental agencies such as the Airports Commission were required to be submitted to the San Mateo County Planning Commission. Section 21151 of the Public Resources Code, then in



Colonel Charles Roberts

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effect, read in part as follows: "All other local governmental agencies shall make an environmental impact report on any project they intend to carry out which may have a significant effect on the environment and shall submit it to the appropriate local planning agency as part of the report required by Section 65402 of the Government Code."

By letter dated October 4, 1972 (copy of which is attached) the EIS accompanying the Application for Request for Aid No. 5 was transmitted to the San Mateo County Planning Commission pursuant to Section 21151 of the Public Resources Code. By letter dated October 10, 1972 (copy enclosed) a copy of the EIS was transmitted to BCDC with a request for comments.

Thereafter, the Public Resources Code was amended (Stats. 1972, Ch. 1154) effective December 2, 1972, adding among other things, Section 21083, providing for the preparation and adoption of guidelines for the implementation of the California Environmental Quality Act.

Section 15083 of the Guidelines, adopted by the Secretary of the Resources Agency on February 3, 1973, for the very first time prescribes the criteria for the preparation of and the procedure for filing of Negative Declarations with the County Clerk of the County in which the project will be located.

Section 21172.5 of the Public Resources Code (effective December 5, 1972) provides: "Any environmental impact report which has been completed or on which substantial work has been performed on or before the 121st day after the effective date of this section, if otherwise legally sufficient, shall, when completed, be deemed to be in compliance with this division and no further environmental impact report shall be required. . ."

Under the aforesaid provision of the Public Resources Code, it is clear that the submission of the EIS to the San Mateo County Planning Commission on October 4, 1972, in full compliance with Section 21151 of the Public Resources Code then in effect, is now deemed by law to be in compliance with the requirements of Division 13 of the Public Resources Code as amended (Stats. 1972, Ch. 2254).

If there is any further information that you require in connection with the application, please do not hesitate to contact me.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



April 5, 1973

April 5, 1973

Board of Parole Commissioners  
Hall of Justice, Room 701  
850 Bryant Street  
San Francisco, California 94103

Attention: Mr. Richard G. Zevitz  
Secretary to the Board

Subject: Rotation of Chairmanship of the Board  
of Parole Commissioners

Gentlemen:

This is in response to your April 3, 1973 request for an opinion as to whether or not the position of Chairman of the County Board of Parole Commissioners may be rotated among its members.

The composition and powers of the County Parole Board are exclusively governed by State law, namely, Article 3.5, Sections 3075-3084 of Part 3, Title 1, of the Penal Code of the State of California. This law does not specifically provide for the chairmanship of a county parole board so under general principles of law this determination is made by majority vote of the members of this three-man board. The salary standardization survey mentioned in your letter has no effect on this power of determination.

You are accordingly advised that the position of Chairman of the Board of Parole Commissioners may be rotated among its members.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





April 9, 1973

Honorable Robert H. Mendelsohn  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Requirement of City Planning Commission  
to Act on Permit Applications or on  
Projects to be Carried Out by City

Dear Supervisor Mendelsohn:

This is in response to your request for an opinion as to the right of the City Planning Commission to withhold approval of permit applications on public projects in the event that the Commission has certified that an Environmental Impact Report is adequate, accurate and objective, and said Environmental Impact Report contains information indicating a significant adverse effect on the environment.

The answer to your question is that the City Planning Commission has no such authority to withhold approval or disapproval of a project in the event that a final Environmental Impact Report contains information that a significant negative impact will be caused by the project, whether public or private.

The City Planning Commission is created pursuant to provisions of Section 3.521 of the City Charter. One of its many duties is the review of permits or licenses affected by zoning or other ordinances of the City and County administered by the City Planning Commission (Section 7.500, City Charter).

Under the Environmental Impact Ordinance, which is presently under consideration by your Board of Supervisors in File No. 504-72-1, the City Planning Commission is charged with the duty and obligation to review public and private projects for consideration as to what effect these projects may have on the environment. In private projects, this review will be started by the filing of a permit application with the Central Permit Bureau, which application will then be forwarded to the City Planning Department for review and analysis as to its environmental effect. If after a



Hon. Robert H. Mendelsohn

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review it is determined that a private project may have a significant effect on the environment, a draft Environmental Impact Report will be prepared and submitted to the City Planning Commission for public hearing. Procedures are provided for in the ordinance. During the public hearing stage and after all relevant comments have been submitted and commented on, it is the duty of the City Planning Commission to make a decision on the final Environmental Impact Report. Upon this event occurring, the permit application will be reviewed in the light of the final Report by the Zoning Administrator, or by the City Planning Commission, if it decides to exercise its right of discretionary review. If the Commission determines that it will review a permit to be issued by City, it will do so, normally after a public hearing has been held.

There are no specific time limits provided in the City Planning Code when a decision is to be made by the Commission acting under discretionary review powers. However, a decision must be made within a reasonable time. Section 306.4(d) of the City Planning Code provides that when the Commission has conducted hearings for amendments to the City Planning Code or conditional uses, the decision of the Commission shall be rendered within ninety days from the date of the conclusion of the hearing, and the failure of the Commission to act shall be deemed to constitute disapproval. Although not specifically applicable to the factual situation presented by your oral request for an opinion, it would appear that this would be the reasonable time for the Commission to make its decision. Failure of the Commission to act, either to approve or to disapprove, would place it in a position where a writ of mandate under Section 1085 of the Code of Civil Procedure would lie to compel the Commission to act.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



April 13, 1973

Mr. Wallace Wortman  
Director of Property  
Real Estate Department  
450 McAllister Street  
San Francisco, California 94102

Subject: Health Department Leases - General

Dear Mr. Wortman:

I have before me your letter inquiring whether the City may be liable to provide relocation assistance to persons displaced from a building leased by the City and used by the Health Department for a residential treatment program.

The California statutory provisions related to relocation assistance are found in Title 1, Division 6, Chapter 15 of the Government Code commencing with Section 7260. Sections 7261 and 7262 require that a public entity "acquiring" property for a public use provide advisory assistance and compensation to any person displaced because of said acquisition. Section 7263 pertaining to displaced dwelling owners would seem to have no pertinence to the instant discussion, but Section 7264 provides additional payments to displaced renters who have occupied the premises acquired for 90 days prior to initiation of negotiations re acquisitions.

If the City is to be held liable for relocation assistance in the situation outlined above, the term "acquire" as used in Section 7260 et seq. must be construed to encompass the lease of premises by the City from a private lessor. The California Act is modeled upon the Federal Uniform Relocation Assistance Act 42 USCA et seq., which also provides relocation assistance only to those persons "displaced" by "acquisition." The House Report on the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, U.S. Code Congressional and Administrative News 5850 (1970) contains the legislative history and exposition of intent of the Federal Act. At page 5853, said report states:





Mr. Wallace Wortman

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"(3) The term 'displaced person' means any person who, on or after the effective date of the act moves from real property, or moves his personal property from real property as a result of the acquisition of such real property, or as the result of written notice of the acquiring agency or any other authorized person to vacate such property for a program or project undertaken by a Federal agency, or by a State agency with Federal financial assistance. If a person moves as the result of such a notice to vacate, it makes no difference whether or not the real property actually is acquired." (Emphasis added.)

As an example of the breadth of the term "acquisition" said report indicates that relocation assistance will be required as to acquisition by lease of post office facilities. Referring to such acquisition at page 5854, said report states:

". . . In most cases, however, building sites are obtained through the Department's leasing authority. Usually, the sites are controlled through an option procedure with title neither vesting in or passing through the Post Office Department. Instead, the option is assigned to a successful bidder who becomes the owner of the land, and the Department's long-term lessor. Some of these sites are for large postal facilities to be constructed in metropolitan areas where the only available and suitable land is occupied by numerous low-income individuals and families, and by small businesses.

"It makes no difference to a person required to move because of the development of a postal facility which method the postal authorities use to obtain the facility, or who acquires the site or holds the fee title to the property. Since the end product is the same, a facility which serves the public and is regarded by the public as a public building, any person so required to move is a displaced person entitled to the benefits of this legislation, . . . "

Thus Congress intends the Federal Act apply to property acquired by lease. If the contemplated Health Department Project receives federal funds, then the Federal Act will in all probability apply to such project. (See 42 USCA 4627, 4630.)





Mr. Wallace Wortman

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April 13, 1973

Assuming that federal funds are not involved, the California Act may still be interpreted to apply to displacement through lease rather than purchase or condemnation. To apply the California Act to the acquisition of a leasehold interest would be within the spirit of the California Act by analogy to the interpretation of the Federal Act set forth above.

There are no appellate decisions interpreting the California Act and due to the ambiguity of the language therein, it is difficult to predict whether the City may be held liable for relocation costs in the instant situation. It is my opinion, however, that there is a strong probability that the Relocation Assistance Act will be applied to acquisition of a leasehold interest by the City.

Either I or Mr. Rene Auguste Chouteau, of this office, will be happy to meet with you to discuss this problem in relation to any specific premises being considered.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



April 18, 1973

Mr. Joseph Mignola, Jr.  
Assistant Director of Public Health  
for Hospital Services  
101 Grove Street  
San Francisco, California 94102

Subject: Availability of Reports on Laguna  
Honda Hospital to Public

Dear Mr. Mignola:

You have asked this office whether certain reports received by Laguna Honda Hospital must be made available to the public. The reports to which you refer are those of the Joint Commission on Accreditation of Hospitals, licensing and inspection reports by the California State Department of Public Health, and the reports of the Medical Staff Survey Committee of the California Medical Association.

Accessibility to the public of records, papers and writings of a public agency, including a chartered city and county, is governed by the provisions of the California Public Records Act. (Government Code Section 6250-6260.)

The California Public Records Act provides in Section 6250 thereof as follows:

"In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."

The term "public records" as defined in section 6252, subdivision (d) of the Act includes:

". . . any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."



Mr. Joseph Mignola, Jr.

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Section 6256 of the Act provides:

"Any person may receive a copy of any identifiable public record or copy thereof. Upon request, an exact copy shall be provided unless impracticable to do so. Computer data shall be provided in a form determined by the agency."

Under Section 6257, it is required that:

"A request for a copy of an identifiable public record or information produced therefrom, or a certified copy of such record, shall be accompanied by payment of a reasonable fee or deposit established by the state or local agency, or the prescribed statutory fee, where applicable."

Section 6254 of the Act provides for exemptions of specific classes of information from disclosure. Potentially applicable exemptions for the reports are contained in subdivisions (c) and (k) of this section.

Section (c) exempts "Personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." It would not appear that this subdivision exempts the reports unless they would contain personnel or medical information regarding specifically named or identifiable patients or employees, which I am informed is not the fact here.

Subdivision (k) of Section 6254 of the Act exempts "Record the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to provisions of the Evidence Code relating to privilege."

Section 1040, subdivision (b) (2) of the Evidence Code relating to the confidentiality of certain "official information" does not prohibit disclosure of such reports. For Section 1040, subdivision (b) (2) to be operative presupposes the information in the reports and the reports themselves to be obtained in confidence. It is my understanding that the reports are not considered confidential by the preparer thereof and authorize release of them by the recipient.

The only remaining potentially applicable exemption from non-disclosure of the reports is Section 6255 of the Act. Such section codifies the common law doctrine of "official privilege" and is distinct from Section 1040 of the Evidence Code.



Mr. Joseph Mignola, Jr.

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Section 6255 provides:

"The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."  
(Emphasis added.)

It is conceivable that an extremely rare factual situation might arise where the withholding of such reports might be justified. However, Sections 6254 and 6255 creating the exceptions for disclosure must be narrowly construed so as not to negate the policy of the act, that is, disclosure of the public's business. You would have to meet a heavy burden to show the non-disclosure clearly outweighs disclosure. The mere fact that the reports may be used by persons looking for "gnats" upon which to base criticisms of the operation of a public institution in order to stir up controversy or to possibly use in future litigation would not seem to create a preponderance of public interest against disclosure.

In conclusion, it would appear that the reports normally must be made available for inspection by the public and copies provided upon the tendering of the costs of copying the reports requested.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





April 18, 1973

Richard D. Hongisto, Sheriff  
333 City Hall  
San Francisco, California 94102

Subject: Binding Arbitration of Employees'  
Disciplinary Suspensions and an  
Employee's Right to be Represented  
When Being Considered for Suspension

Dear Sheriff Hongisto:

This is in reply to your request for my opinion as to whether or not you, as the appointing officer of the Sheriff's Department, may enter into a memorandum of understanding, with a labor organization, which contains provisions for binding arbitration of disciplinary suspensions and affording an opportunity for a union representative to be present when an employee is being considered for suspension. When you use the term "binding arbitration," it is presumed you are utilizing the traditional definition of same; i.e., a method of resolving a dispute under which the parties to a controversy must accept the award or decision of a neutral third party.

The power and duty for an appointing officer to suspend an employee for disciplinary purposes is contained in Section 8.342 of the San Francisco Charter.

In my Letter Opinion No. 71-28 of May 10, 1971, the basic issue discussed was whether or not an officer of the City and County who is charged by the Charter with the duty of carrying out specific policies relating to employee relations could abdicate or delegate that duty to a third party.

The conclusion of that opinion, based upon the authorities cited therein, was that powers vested in an officer or board of a municipality by the Charter which involve the exercise of discretion, could not be lawfully delegated. A copy of that opinion is attached for your information.

A "discretionary act" is defined in Elder v. Anderson (1962) 205 C.A.2d 326 as follows:



Richard D. Hongisto

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"Discretion in the manner of the performance of an act arises when the act may be performed in one of two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed. . . ." (At page 331.)

Pursuant to the criteria set forth in the Elder case (supra) it is my opinion that an appointing officer suspending an employee pursuant to Section 8.342 of the Charter involves the "exercise of discretion" on his part and therefore said discretionary authority could not be lawfully delegated to a third party arbitrator for a final and binding decision.

Section 8.342 of the Charter states as follows:

"Disciplinary Suspensions

"The appointing officer may, for disciplinary purposes, suspend a subordinate for a period not exceeding thirty days; and suspension shall carry with it the loss of salary for the period of suspension. The suspended employee shall be notified in writing of the reason for such suspension, and if the suspension be for more than five days the employee shall, at his request, be given a hearing by the appointing officer. The decision of the appointing officer in all cases of suspension for disciplinary purposes shall be final."

In reviewing this section it is apparent that an appointing officer can suspend an employee for up to thirty days without even having to "confront" the employee inasmuch as the Charter provides that the employee need only be notified in writing of the reason for such suspension. However, if the suspension is for more than five days, a hearing on the issue may be had at the request of the suspended employee.

This summary procedure of discipline has in the recent past been challenged as violative of the employee's constitutionally protected right of due process.

In Patton v. Board of Harbor Commissioner (1970) 13 Cal. App.3d 536 the court considered Los Angeles Charter provisions containing language similar to San Francisco's with regard to a five-day suspension. The court held that temporary and minor disciplinary measures (five-day suspensions) taken by a department head did not justify a holding that a hearing is the employee's constitutional right whenever his superior feels it necessary to discipline him in that particular way.



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In Bert Alpert, et al. v. City and County of San Francisco, et al. (1971) 1 Civil 28142, Court of Appeal of the State of California, First Appellate District, Division Four (certified for nonpublication) the court specifically considered disciplinary suspensions under then Charter Section 154, now Section 8.342. The court concluded that on the facts in the instant case (five-day suspension without notice or hearing) there was no violation of the due process clause of either the federal or state Constitutions.

In Steen v. Board of Civil Service Commrs. (1945) 26 Cal.2d 716 the board refused to allow a petitioner's counsel to participate in a discharge proceeding. The court stated as follows at page 727:

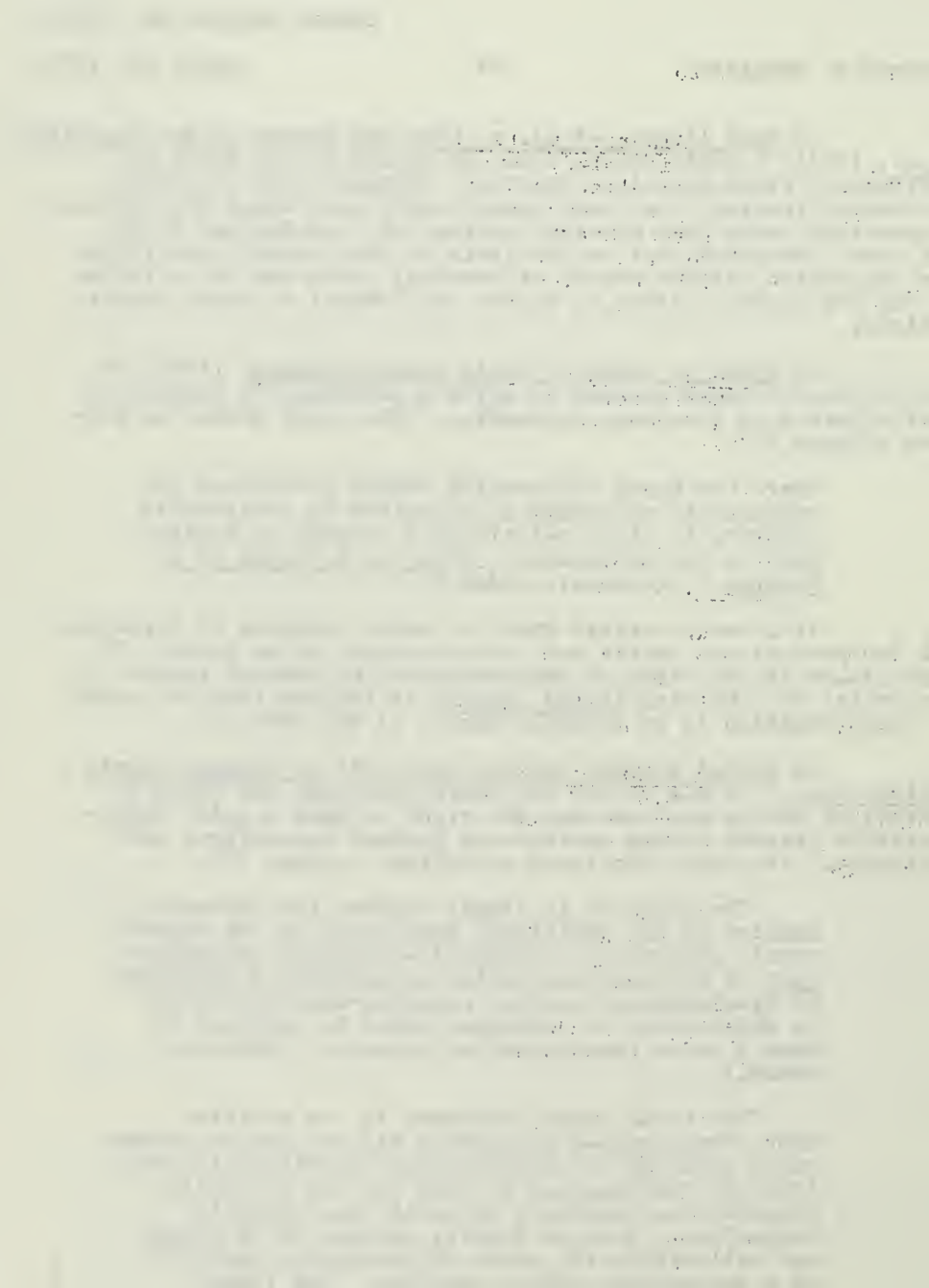
"Here the board effectually denied petitioner the opportunity of making an objection by arbitrarily refusing to allow petitioner's counsel to participate in the proceeding. This was a denial of a hearing." (Emphasis added.)

It is well settled that the basic elements of a procedural due process are notice and an opportunity to be heard. If deprivation of the right of representation by counsel results in the denial of a hearing (Steen, supra) it follows that the right of representation is an integral aspect of due process.

In Social Workers' Union, Local 535 v. Alameda County Welfare Dept., 30 C.A.3d 792 the court discussed the issue of whether or not an employee had the right to have a union representative present during conferences between supervisors and employees. The court concluded as follows on page 795:

"The question is simply whether the attempted inquiry of the individual appellants by the Department's supervisory personnel was merely investigatory or whether such action amounted to a grievance or disciplinary or other employer-employee matter in which event the employee would be entitled to have a union representative present. (Emphasis added.)

"The trial court concluded in its decision that 'The proposed conference did not relate to any union activity or organizational problem. It only involved the question of when the use of public property (automobiles) by public employees is authorized. Such an inquiry appears to be proper and well within the scope of reasonable scrutiny of a supervising public employee. The letter





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addressed to the twenty-three employees who did not object to the proceeding is substantial evidence that it was not a disciplinary proceeding.'

"We agree wholeheartedly with the trial court's conclusion. Appellants' contention, carried to its logical conclusion, would mean that, for all practical purposes, a union representative would be entitled to be present at each and every discussion between supervising and subordinate public employees concerning any matter which might involve a criticism or condemnation of the subordinate's work, his awareness of rules and regulations, his misuse or abuse of public property, his attention to duty, even to matters which might properly be viewed as counselling or instructive.

"In short, to uphold appellants' contention would be to place a judicial imprimatur upon a potentiality of work stoppage in places of public employment. We reject any such suggestion, as did the trial judge, who felt 'constrained' to point that 'A careful review of all testimony and documents in evidence indicates at best, a whimsical and juvenile attitude toward their supervising officers on the part of these petitioners.'"

Section 3503 of the Government Code provides in part that "Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies." (Emphasis added.)

Section 3500 of the Government Code provides that "nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances and rules of local public agencies which establish and regulate a merit or civil service system. . ."

Since none of the unions you are dealing with have been "recognized" by the City and County of San Francisco, Section 3503 of the Government Code would not be applicable. And if the union in question were "recognized," it still would not be able to claim representation of an employee in a five-day disciplinary suspension situation inasmuch as the applicable Charter provision does not, at that stage, even afford the employee an opportunity to be heard in his own defense and that Charter provision is not superseded by the aforementioned section of the Government Code.





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Applying the court's reasoning in Patton, supra, that minimal summary disciplinary procedures do not justify a holding that a hearing is an employee's constitutional right and keeping in mind that the right to be represented is a closely associated aspect of due process (notice and hearing), it is my opinion that the same rationale which supports a conclusion that no hearing is required for a five-day disciplinary suspension would also support the conclusion that an employee does not have the right to be represented in that particular situation.

Based upon the foregoing, it is also my opinion that the appropriate procedures with regard to representation and disciplinary suspensions are as follows:

In situations where conferences are held between the appointing officer or supervisor and the employee which are purely investigatory and no discipline is involved or results, the employee is not entitled to have a representative present.

In situations where the appointing officer, based on facts at his disposal, is contemplating a five-day or less disciplinary suspension the appointing officer may either suspend the employee without confronting him, by utilizing written notice or if the appointing officer does choose to discuss the matter with the employee and the suspension is limited to five days or less, the employee is not entitled to be represented.

In situations where it is contemplated that disciplinary suspensions exceeding five days will result, the appointing officer may suspend the employee without confronting him, by utilizing written notice of the charges and the suspension. The employee then has the right to request a formal hearing and also has the concomitant right to be represented. If the appointing officer contemplates a suspension exceeding five days and desires to hold a conference with the employee on the issue, the former should allow the employee to have a representative present.

However, it should be pointed out that while the law does not require that the employee be entitled to have a representative present in the above mentioned situations, there is no legal impediment which would prohibit an appointing officer from allowing a representative to be present in the above situation if the former so desired.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



April 23, 1973

Mr. Bernard Orsi  
General Manager, Personnel  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Definition of "Day-to-Day Line Supervision"  
for Entitlement to Salary Adjustment Under  
Section VII(H), Salary Standardization  
Ordinance 1971-1972

Dear Mr. Orsi:

This is in reply to your request for opinion on the definition of "immediate day-to-day line supervision" in Section VII(H) of the Salary Standardization Ordinance for fiscal year 1971-72. Section VII(H) provides a salary adjustment for supervisors who exercise day-to-day line supervision and whose salary is less than 5% over the base pay of the class which he supervises.

Section VII(H) provides in part:

"Subject to the following conditions, the Civil Service Commission is hereby authorized to adjust the compensation of a supervisory employee

"1) That as a part of the regular responsibilities of his class, the supervisor is required to exercise immediate day-to-day line supervision over a subordinate.

"2) That day-to-day line supervision is exclusive of local administrative control and work assignments of craft personnel on regular, extended, or temporary assignments."

Line authority has a specified meaning in business organization. It is that relationship in which a superior exercises direct command over a subordinate--an authority relationship in direct line or steps. (Principles of Management, 3rd ed. (1964) Koontz and O'Donnell, ch. 15, p. 263.)



Mr. Bernard A. Orsi

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The word "supervise" is defined in Webster's New International Dictionary Unabridged (3rd ed. 1971) as follows:

"To coordinate, direct, and inspect continuously and at first hand the accomplishment of : oversee with the powers of direction and decision the implementation of one's own or another's intentions."

Under these definitions, it is my opinion that "immediate day-to-day line supervision," as used in Section VII(H), contemplates that the supervisor, as a part of the regular duties of his class, exercise direct and immediate command over a subordinate employee on a daily basis, oversees and coordinates his work, and makes decisions respecting the method of accomplishing the objectives of the work. Those supervisors who come within this definition and otherwise meet the conditions of Section VII(H) of the Salary Standardization Ordinance of 1971-72 would be entitled to the salary adjustment provided in that section.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



April 23, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Amendments to Government Code Section  
3500 et seq. (Meyers-Milias-Brown Act)  
and Possible Effects Thereof on San  
Francisco's Proposed Employee Relations  
Ordinance

Dear Mr. Dolan:

Pursuant to your request of April 3, 1973, the following report, on recent and proposed amendments to the Meyers-Milias-Brown Act and their possible effect upon the City's proposed employee relations ordinance, is submitted.

Effective in 1970, Section 3501 of the Government Code (hereinafter G.C.) was amended by the addition of language which further defined a "public employee" for purposes of the Meyers-Milias-Brown Act (hereinafter M.M.B.A.) as "including employees of fire departments and fire services of the state, counties, cities, cities and counties, districts, and other political subdivisions of the state."

Section 3507.5 of the G.C. placing certain limitations on management and confidential employees was amended to add language that provides: "Except as specifically provided otherwise in this chapter, this section does not otherwise limit the right of employees to be members of and to hold office in an employee organization."

Effective on November 23, 1970 (1970 Legislative Session) Section 3505 of the G.C. relating to the good faith requirement of labor and management to meet and confer, language was added requiring that the parties meet and confer "within a reasonable time" in an endeavor to reach an agreement.

Section 3507 of the G.C., covering the topic of the public agency adopting rules and regulations for the granting of recognition to an employee organization, was amended by adding language





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providing that "No public agency shall unreasonably withhold recognition of employee organizations."

Effective in 1972, Section 3501 of the G.C. relating to the definition of a "public agency" for the purpose of the M.M.B.A., the "State of California" was added as not being within said definition.

In Section 3505 of the G.C. pertaining to labor and management's mutual obligation to meet and confer in good faith in an effort to reach agreement language was added that they do so "prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent."

Section 3507 of the G.C. pertaining to the authorizing of local public entities to adopt reasonable rules and regulations for the administration of employer-employee relations was amended to add language permitting exclusive recognition of an employee organization subject to the right of an employee to represent himself and language was also added permitting decertification of an exclusively recognized employee organization but only after a period of not less than twelve months following recognition.

Section 3507.1 was added to the G.C. providing:

"In the absence of local procedures for resolving disputes on the appropriateness of a unit of representation, upon the request of any of the parties, the dispute shall be submitted to the Department of Conciliation of the Department of Industrial Relations for mediation or for recommendation for resolving the dispute.

"SEC. 2. The provisions of this act shall not apply to the State of California."

Section 3507 of the G.C. is the section which authorizes the local public agency to adopt rules and regulations for the administration of employer-employee relations pursuant to M.M.B.A. A permissible rule or regulation would be that covering representation units as referred to in Section 3507.1, supra.

Effective in 1973, Section 3507.3 of the G.C. which grants professional employees the right to be represented separately from nonprofessional employees language was added to the effect that "In the event of a dispute on the appropriateness of a unit of representation for professional employees, upon request of any of the parties, the dispute shall be submitted to the Division of Conciliation of the Department of Industrial Relations for



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mediation or for recommendation for resolving the dispute."

Section 3500 of the G.C., which sets forth the purpose and applicability of the M.M.B.A., was amended to add language stating "nor is it intended that this Chapter [MMB] be binding upon those public agencies which provide procedures for the administration of employer-employee relations in accordance with the provisions of this Chapter."

The most important language in the Meyers-Milias-Brown Act as far as a local public entity is concerned would be that contained in Section 3500, as amended:

"Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations nor is it intended that this chapter be binding upon those public agencies which provide procedures for the administration of employer-employee relations in accordance with provisions of this chapter . . ."

The question for determination is what effect, if any, does the M.M.B.A., as amended, have upon the City's proposed employee relations ordinance or more concisely is the latter "in accord with" the former. With the exception of the three instances set forth below, it is my opinion that the City's ordinance is in accord with the provisions of M.M.B.A. and that the state legislation does not have any adverse effect upon the City's proposed ordinance.

Preliminarily, Section 3507 of the M.M.B.A. provides that "no public agency shall unreasonably withhold recognition of employee organizations." With the exception of the San Francisco Police Officers Association, the Officers for Justice and Fire Fighters Union, Local 798 the City and County has not granted recognition to any other employee organizations representing City employees in spite of the fact that some of these organizations requested recognition as early as mid-1969.

If legally challenged, this failure to act for said period of time could possibly be held to constitute "unreasonably withholding recognition."

Secondly, Section 3507.1 provides that in the absence of local procedures for resolving disputes as to the appropriateness of representation units any party to the dispute may make a request and the matter shall be submitted to the Department of Conciliation





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of the Department of Industrial Relations for mediation or recommendation for settling the dispute.

The language indicates that the Department of Conciliation's recommendation will not be binding upon the parties but the fact remains that every time there is such a dispute and a request is made that the matter must be submitted to the Department of Industrial Relations for assistance in settling the dispute.

Passage of the City's proposed ordinance would render inoperative Section 3507.1 inasmuch as the latter applies only "in the absence of local procedures" for resolving the dispute.

Section 16.210 sub. (b) of the City's proposed ordinance provides a method whereby disputes as to the inclusion of employees in particular representation units can be raised and a final determination on the issue made by the Municipal Employees Relations Panel.

Finally, Section 3507.3 of the M.M.B.A. is essentially to the same effect as Section 3507.1 with the difference being that Section 3507.1 deals with representation units of "general employees" and Section 3507.3 deals with the appropriateness of representation units for professional employees.

The same analysis and conclusions as applied above to Section 3507.1 would be applicable to Section 3507.3.

The cardinal section of the M.M.B.A. is Section 3500 providing local charter provisions and ordinances are not superseded by the Act and that the M.M.B.A. is not binding upon local public entities which provide procedures regulating employer-employee relations which are in accord with the provisions of said M.M.B.A.

I have reviewed the City's proposed Employee Relations Ordinance and it is my opinion that all the substantive aspects of the M.M.B.A. are incorporated therein. The remainder of said Ordinance consists of procedural language necessary for the implementation of the substantive aspects and these procedures, in my opinion, are also in harmony with the spirit of the M.M.B.A.

Therefore, if the City's proposed ordinance were adopted, it would be in accord with the M.M.B.A. and additionally, pursuant to the expressed intent of this language contained in G.C. Section 3500, the provisions of the latter would not be binding upon the City and County.

Accordingly, those amendments (§§3507.1 and 3507.3) which were pointed above as having an effect upon the "manner" in which employee relations would be handled at the local level would also not be applicable to the City and County.





Mr. Robert J. Dolan

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April 23, 1973

As of this date, there have been five bills introduced in the 1973-74 state legislative session which would amend, repeal or affect some or all of the provisions of the M.M.B.A.

Assembly Bill 33 would add Chapter 10.1 to the Government Code. This new chapter contains essentially the same provisions as are presently in the M.M.B.A. The difference being that Chapter 10.1 would only be applicable to "local safety employees" defined as city policemen, constables, deputy sheriffs, deputy marshals, district attorney investigators, city firemen, county firemen and firemen of any fire district of the state.

These people are presently covered by the terms of the M.M.B.A. and the passage of A.B. 33 would appear to have no effect upon the proposed City employee relations ordinance. The result would be that there would exist two pieces of state legislations providing for essentially the same things but applicable to two different classifications of public employees.

Senate Bill 32 and Assembly Bill 322 are the same pieces of legislation but introduced in separate houses. They would outline prohibited practices by the employee and the employer, require mediation and fact-finding with public recommendations, authorize the agency shop and provide for binding grievance arbitration.

Assembly Bill 485 would provide that employee organizations could file petitions with the California Department of Industrial Relations for a determination, by election, of the appropriate representation unit and the majority representative of the employees in said representation unit.

Assembly Bill 1243 is referred to as the "Moretti Bill" and its genesis is the "Report of the Assembly Advisory Council on Public Employee Relations" submitted on March 15, 1973. It calls for the right to strike for all public employees and includes provisions requiring mediation and fact-finding with recommendations. The bill also includes a provision empowering the court to halt a strike where public health or safety are threatened but would require the court to direct both parties to accept the fact finder's recommendations in cases where an injunction holding or prohibiting a strike is issued. It would make union security arrangements a mandatory subject of bargaining and authorize agency shop and binding arbitration or grievances.

Three of these bills (excluding Assembly Bills 33 and 485) would repeal the M.M.B.A. and replace it with a comprehensive statute governing public employee labor relations highlighted by



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the creation of a State Board to administer the state's employee-employer relations laws.

These three bills also contain a provision that they will not be applicable to local public agencies which have adopted rules and procedures which are similar to the state law and have been submitted to and approved by the aforementioned State Board.

A detailed analysis of these voluminous bills and the possible effect they might have on the City's proposed ordinance will not be made at this time inasmuch as it is quite possible that none of them will be adopted and even if in fact one or more of the bills are passed and signed into law, it would be mere speculation as to what their final form might be.

Senate and Assembly bills of the same nature have been introduced over the past three years and have experienced very little movement in the Legislature.

The possibility of passage of these bills is best summarized in an article in the County Employee which is the official publication of the Los Angeles County Employees Association. Quoting Governor Reagan at a meeting on March 9, 1973, with the Academic Senate of California University and Colleges the article states:

"Any hope for a successful collective bargaining bill for public employees this year apparently went down the drain when Gov. Reagan said flatly he is 'irrevocably opposed' to collective bargaining, arbitration and the right to strike for any public employee in the State of California.

"As it is virtually impossible to overturn a Reagan veto with the present complexion of the State Legislature, his opposition is tantamount to sudden death for any meaningful collective bargaining bill that gets by both houses."

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



April 24, 1973

Mr. Loris DiGrazia, President  
Recreation and Park Commission  
McLaren Lodge, Golden Gate Park  
San Francisco, California 94117

Subject: Extension of Lease of St. Mary's  
Square Garage

Dear Mr. DiGrazia:

As you have requested my opinion as to the necessity for public bidding as a condition precedent to the grant of a 15-year extension of the lease of the St. Mary's Square Garage to Mr. S. E. Onorato, I submit the following:

Charter Section 7.403(b) provides in part:

"The commission may lease to the highest responsible bidder for a term of not to exceed fifty years and upon such other terms and conditions as it may determine, subsurface space under any public park or square and the right and privilege to conduct and operate therein a public automobile parking station, provided that the said construction, when completed, and the operation will not be, in any material respect or degree, detrimental to the original purpose for which said park or square was dedicated or in contravention of the condition of any grant under which said park or square might have been received."

This section clearly requires that any subsurface park space, including that encompassing the St. Mary's Square Garage, be leased only through the process of public bidding. Any lease which is entered into in violation of the requirements of this section will be void. Hilliard v. Seattle (1963) 63 Wash.2d 401, 387 P.2d 536.

An extension of Mr. Onorato's present lease for a term of 15 years will effectively create a leasehold interest upon the



Mr. Loris DiGrazia

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terms and conditions agreed upon. Such an interest is substantial and the bidding requirement cannot be ignored. See Cullingham v. Omaha 143 Neb. 744, 10 NW 2d 615, 12 NW 2d 124.

The lease for the extended term should be put out to bid in the same fashion as was the original lease of the premises.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





April 25, 1973

Mr. Warren T. Jenkins  
Chief Adult Probation Officer  
Hall of Justice  
880 Bryant Street  
San Francisco, California 94103

Subject: Authority to Require Probation  
Officers to Receive Training in  
the Exercise of Powers to Arrest

Dear Mr. Jenkins:

This is in response to your March 19, 1973 letter in which you request my opinion as to whether you have the authority to require all probation officers to comply with the mandate of Section 832 of the Penal Code which prescribes that peace officers receive a course of training, inter alia, in the exercise of their powers to arrest and whether they lose their classification of probation officer if they fail to take the course. You point out that probation officers on occasion make an arrest under the provisions of Section 1203.2 of the Penal Code.

Prior to 1968, Section 817 of the Penal Code designated those persons who possess the authority of peace officers, and probation officers were not included in such designation. In 1968 Section 817 of the Penal Code was repealed and Chapter 4.5 of Part 3, Title 3, Sections 830-830.6, was enacted setting forth those persons who possess the status of peace officers. Under the provisions of Section 830.5 of this enactment, probation officers were granted peace officer status and have possessed such status since that enactment. In 1971, Section 832 was added to Chapter 4.5 requiring that every peace officer, with certain exceptions, receive a course of training in the exercise of his powers to arrest and a course of training in the carrying and use of firearms. Peace officers who fail to satisfactorily complete the course of training by July 1, 1974, or within twelve months of the date of their employment, whichever period is greater, cannot exercise the powers of a peace officer until they satisfactorily complete such courses. Probation officers do not carry or use firearms in their employment hence they would not be required to take the firearms



Mr. Warren T. Jenkins

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training course. (Sec. 832(a).)

However, as indicated in your letter, the arrests made by your probation officers are made pursuant to the authority contained in Section 1203.2 of the Penal Code adopted in 1935 which provides in part as follows:

"At any time during the probationary period of the person released on probation in accordance with the provisions of these sections, any probation or peace officer may without warrant, or other process, at any time until the final disposition of the case, rearrest any person so placed on probation under the care of a probation officer, and bring him before the court, . . ."

You will note that the authority given to arrest in this section is to any probation or peace officer. This language indicates a clear intent on the part of the Legislature that probation officers would have the power to make the arrests designated in this section irrespective of their status as peace officers as probation officers did not possess the status of peace officers at the time of this enactment and were not granted such status until 1968. This intent was further manifested in 1970 when the language of Section 1203.2 was amended by the Legislature and the alternative designation of probation or peace officer was retained despite the fact that probation officers possessed peace officer status at that time. Thus, if your probation officers fail to take the training course in how to make an arrest prescribed by Section 832 of the Penal Code within the specified time, they will lose their powers as peace officers until they do satisfactorily complete such course, but they will still retain their powers to make arrests in their status as probation officers under the provisions of Section 1203.2 in view of the authority therein specifically granted.

As to your authority to require that your probation officers take the prescribed course, you are advised that you possess no such authority. While under the provisions of Section 4.105 of the Charter probation officers must perform the duties prescribed by the laws of the State of California and shall have the necessary powers to perform such duties, Sections 830.5 and 832 of the Penal Code prescribe no duties for a probation officer but rather relate to a status and qualifications for retention of such status. Under the provisions of Sections 3.660 and 3.661 of the Charter, the Civil Service Commission is vested with the sole City and County authority to prescribe qualifications for positions in the City and County service. This authority, however, must be exercised in the recruitment and examination process prior to appointment and once a person has qualified and has been appointed to a position in the City and County service, the Commission may



Mr. Warren T. Jenkins

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not thereafter prescribe further qualifications for the retention of such position (see City Attorney's Opinion No. 65-17, dated June 7, 1965); unless such qualifications are mandated by the State of California for the exercise of the functions of a position involving a matter of statewide concern within the constitutional preemptive authority of the State to so mandate. (See City Attorney's Opinion No. 468, dated November 28, 1951.) The State has not so mandated in this case for, as stated, Sections 830.5 and 832 relate to status as a peace officer and qualification for such status and not to either qualifications or duties for the position of probation officer in the City and County service. Accordingly, failure to complete the course prescribed by Section 832 would not cause your probation officers to lose their classification of probation officer.

In summation and in direct answer to your inquiry, it is my opinion that you do not have the authority to require all probation officers to comply with the mandate of Section 832 of the Penal Code and that if they fail to take the course, they will not lose their classification of probation officer.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





May 7, 1973

Mr. Robert G. Lee  
Assistant Deputy Director, Engineering  
San Francisco International Airport  
San Francisco, California 94128

Subject: Airport Contract No. 772. Levelling  
Runway and Taxiway Shoulders. Bid Review

Dear Mr. Lee:

By letter dated April 30, 1973 you have asked for our advice concerning the bidding on the above noted contract. Because of imperfections in such bidding process, you ask whether it would be legally proper to reject all bids and readvertise, or to reject the lowest bid and award the contract to the second low bidder.

The Airport Engineering staff indicates, as does our review of the bid summaries, the presence of an unbalancing by FF & M of the bid prices on Items 54-1 and 70, especially so regarding Item 70.

The contract document recites that the Airports Commission reserves the right to "reject any and all bids." (Section 10.) Section 2 of the said contract forbids any unbalancing of unit prices by a bidder.

Under the law controlling a situation such as the present one, considered together with the prevailing factual context, it would appear to us that the Commission is free to, and should, exercise its authority to reject all bids and to put this proposal out again in a rebidding process.

Should you desire further assistance on this matter, or further development of the legal analysis which has induced us to give the above advice, please call or write.

We return herewith the contract and bid materials which you sent with your letter requesting advice.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



May 9, 1973

The Honorable Joseph L. Alioto  
Mayor of San Francisco  
200 City Hall  
San Francisco, California 94102

Attention: General Stanley R. Larsen

Subject: Conflict of Interest Regarding Service  
of Department of Public Works Employee  
on City Committee to Review City's Waste  
Water Master Plan

Dear General Larsen:

You have asked for my opinion as to whether there is a conflict of interest under the Charter where a Department of Public Works employee is appointed to a committee created by the Board of Supervisors to review the Waste Water Master Plan prepared by the Department of Public Works.

By Resolution No. 19-73 the Board of Supervisors created a Citizens' Committee for Public Participation in Waste Water Project Evaluation. The members of the Committee were to be appointed by the Mayor as follows: twelve nominees from twelve enumerated civic organizations; eight representatives of eight neighborhood organizations chosen by the Mayor; four individuals nominated by the Board of Supervisors and four individuals nominated by the Mayor. The latter eight members were to have some expertise in the subject matter.

After appointment by the Mayor upon nomination by one of the twelve civic organizations, it was found that one of the appointees was regularly and permanently employed by the Bureau of Engineering of the Department of Public Works of the City. The Bureau of Engineering prepared the Waste Water Master Plan.

Under the resolution the Committee was directed to meet periodically with representatives of the Mayor's Office, Chief Administrative Officer and the Department of Public Works to maintain a continuing review of the Master Plan for Waste Water Management, its financing, scheduling and implementation.



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Section 8.105(b) of the Charter provides as follows:

"No supervisor and no officer or employee of the city and county shall engage in any activity, employment or business or professional work or enterprise which is inconsistent, incompatible, or in conflict with his duties as a supervisor or officer or employee of the city and county or with the duties, functions and responsibilities of his appointing power, or the department, office or agency by which he is employed, or the board or commission of which he is a member."

Inconsistency and incompatibility do not consist of the physical impossibility to discharge the duties of two positions, but rather are in a conflict between the positions, as where one is subordinate to the other and subject to some degree to the supervisory power of the other, or where the person holding one position has the power to remove the person holding the other or audit the accounts of the other. And it is not necessary that the clash of duties should exist in all or in a greater part of the functions of the positions. It is sufficient if one position is superior to the other in some of the principal duties, so that the exercise of such duties might conflict, to the public detriment, with the exercise of duties of the subordinate position. (See People ex. rel Chapman v. Rapsey, 16 Cal.2d 636, 642.)

The policy behind the provisions of the Charter demands that an employee discharge his duties with undivided loyalty and is intended to assure the performance of that quality. Its applicability does not turn on the integrity of the person concerned or upon his individual capacity to achieve impartiality. It applies inexorably if the positions come within it, no matter how worthy the person's purpose or extraordinary his talent. (See 3 McQuillin, Municipal Corporation, Section 1267, pp. 294-295.)

Establishment of the Committee was for the purpose of increasing the level of public participation in the City's waste water planning by providing full public input through a committee representing a broad spectrum of the City. Therefore any member of the committee in carrying out his duties and responsibilities would be a representative of the public and should review the plans and provide input from that stance.

Thus, an employee's duties and responsibilities as a member of the committee would put him in conflict with his duties as an employee of the Bureau of Engineering and the duties and functions and responsibilities of the Department of Public Works and the Director of Public Works, the employees appointing power. This conflict arises from the fact that the waste water plan was





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drawn up by the Department of Public Works and such department and its Director would certainly support the plan as proposed before the Committee at the time of review and public input. It would engender divided loyalties and put the employee in the position of having to prefer one obligation to another; that is, choosing to carry out his duties as a committee member and be in opposition to his department and superior or to support his department and superior to the detriment of his obligation as a committee member representing the public.

You are advised, therefore, in my opinion there would be a conflict of interest under Section 8.105(b) of the Charter were a permanent employee of the Bureau of Engineering of the Department of Public Works also to be a member of the Citizens' Committee for Public Participation in Waste Water Project Evaluation to review the City's Master Plan for Waste Water Management.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





May 10, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Western Cable Television  
Abandonment of its Franchise

Dear Mr. Dolan:

Pursuant to your request, I am attaching an ordinance which, if adopted by the Board of Supervisors, would effectively accept the abandonment of said franchise.

There appears to be no legal impediment to the Board of Supervisors' accepting Western's abandonment of this franchise. Generally speaking, a municipal corporation could refuse to accept an abandonment of a franchise such as this if the result were that the public would be deprived of some service offered by the franchise. In this case, however, as fully set forth in the letter from Mr. E. M. Allen, attached to your request, Western Cable Television has in fact never supplied any service to the residents of the City and County of San Francisco and as it presently stands, it is virtually impossible that they would or will be able to furnish any service in the near future.

Under the circumstances it appears that it would be entirely appropriate for the Board of Supervisors to accept Western Cable Television's abandonment of this franchise.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



May 14, 1973

Mr. J. L. Bardoff  
Principal Engineer  
San Francisco Water Department  
425 Mason Street  
San Francisco, California 94101

Subject: Amendments to California Labor Code  
Affecting Apprenticeship Programs

Dear Mr. Bardoff:

This is in response to your letter of April 27, 1973, regarding recent changes in the California Labor Code which affect Apprenticeship Programs, to wit, amendment to Section 1777.5 and addition of Section 3098, and your request for advice as to the effect of these changes on certain Water Department documents which accompany your letter, to wit, ST-123 and ST-123A through ST-123E.

New Section 3098 of the Labor Code provides:

"An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. The division shall notify the local joint apprenticeship committee regarding such award. Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards. (Added by Stats. 1972, C. 1399, p. \_\_\_\_\_, §2.)"

One particular amendment to Section 1777.5 of the Labor Code is that:

"This section shall not apply to prime contracts involving less than thirty thousand dollars (\$30,000.00) or 20 working days."



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Since Section 3098 incorporates the jurisdiction of Section 1777.5, ". . . it does not apply to prime contracts involving less than thirty thousand dollars (\$30,000.00) or 20 working days."

The emphasized sentence of the following excerpt from the 1972 amendment to Section 1777.5 is the only portion thereof which further obligates an awarding agency.

"§1777.5

\* \* \*

"The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulation shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor."

In view of the other changes to Section 1777.5, which are set forth in the memorandum-letter of April 6, 1973 from the State Division of Apprenticeship Standards, attached to your letter, the first two paragraphs of the "Apprenticeship Program" Addendum (ST-123) should be revised as follows:

"Attention is directed to the provisions in Sections 1777.5 (Chapters 1087, 1389, Statutes of 1972) and 1777.6 (Chapter 280, Statutes 1971) of the Labor Code concerning the employment of apprentices by the contractor or any of his sub-contractors.

"Section 1777.5, as amended, requires the contractor or sub-contractor employing tradesmen in any apprenticeable occupation to apply to the joint apprenticeship committee nearest the site of the public works project, and which administers the apprenticeship program in that trade, for a certificate of approval - except when they are already covered by the local apprenticeship standards. The certificate will also fix the ratio of apprentices to journeymen that will be used in the performance of the contract. The ratio of apprentices to journeymen in such cases shall not be less than one to five except when the contractor provides evidence that he employs registered apprentices on all of his contracts in the state on an annual average of not less than one apprentice to eight journeymen. The joint apprenticeship committee has discretion to grant a certificate





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exempting a contractor from the 1 - to - 5 ratio if it finds any one of the following conditions is met:

- "A. In the event unemployment for the previous three-month period in such area exceeds an average of 15 percent, or
- "B. In the event the number of apprentices in training in such area exceeds a ratio of 1 to 5, or
- "C. If there is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either (1) on a statewide basis, or (2) on a local basis.
- "D. If assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman."

Further, a paragraph should be inserted in ST-123 stating that Section 1777.5, as amended, does not apply to prime contracts involving less than thirty thousand dollars (\$30,000.00) or 20 days.

With regard to pages ST-123A, ST-123B and ST-123C it appears they are requisite contract documents since they are in pursuance and furtherance of the "Affirmative Action (Nondiscrimination) Program" of the Board of Supervisors. Since we are advised that pages ST-123D and ST-123E are required by the Human Rights Commission, pursuant to its authority, in contracts involving \$300,000 or more, they should be included accordingly.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



May 15, 1973

Dr. Washington E. Garner, President  
The Police Commission  
Hall of Justice  
850 Bryant Street  
San Francisco, California 94103

Subject: Right of Police Commission to Exclude  
the Use of Cameras by the News Media at  
Disciplinary Hearings Conducted by the  
Commission

Dear Doctor Garner:

This is in response to the request for an opinion contained in your May 3, 1973, letter as to whether the Police Commission has the right to exclude members of the press who insist on using cameras (TV, etc.) to record hearings on disciplinary matters involving members of the Police Department even though the members may of their own volition request them to do so, or whether such exclusionary action would be a violation of the Ralph M. Brown Act of the California Government Code. You state in your letter that you have always excluded the news media or anyone insofar as their use of cameras to record the proceedings is involved.

Under the provisions of the Brown Act, Sections 54950 to 54961 of the Government Code, all meetings of the Police Commission are required to be open and public except where an executive session is permitted under the provisions of said Act. The allowable executive session pertinent here is that found in the provisions of Section 54957 of the Act which permits such a session to "consider the appointment, employment or dismissal of a public officer or employee or to hear complaints or charges brought against such officer or employee by another public officer, person or employee unless such officer or employee requests a public hearing." Under this provision, the officer has a right to a private meeting and hearing but in the situation described in your letter this right of privacy has not been invoked and the meeting, therefore, becomes an open public meeting subject to all of the requirements and sanctions of the Brown Act and it further, in the particular case, becomes a public trial to which the officer is entitled under the provisions of Section 8.343 of the Charter. All members of the public and communications media have a right to



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attend such meeting and the only exclusions specifically recognized by the Brown Act are all other witnesses during the examination of a witness (§ 54957) and those permitted under the circumstances set forth in Section 54957.9 which reads as follows:

"§ 54957.9. Authorization to clear room  
where meeting wilfully interrupted, etc.

"In the event that any meeting is willfully interrupted by a group or groups of persons so as to render the orderly conduct of such meeting unfeasible and order cannot be restored by the removal of individuals who are willfully interrupting the meeting, the members of the legislative body conducting the meeting may order the meeting room cleared and continue in session. Only matters appearing on the agenda may be considered in such a session. Duly accredited representatives of the press or other news media, except those participating in the disturbance, shall be allowed to attend any session held pursuant to this section. Nothing in this section shall prohibit the legislative body from establishing a procedure for readmitting an individual or individuals not responsible for wilfully disturbing the orderly conduct of the meeting."

With particular respect to the use of equipment at the meeting by members of the communications media the Brown Act is silent, but the California District Court of Appeal in the case of Nevens v. City of Chino, 233 C.A.2d 775 considered the validity of a resolution of the City Council of Chino prohibiting tape recorders in the council chambers during council proceedings. The court held such prior restraint invalid, pointing out that it constituted an indirect infringement on the constitutional guarantees of freedom of speech and of the press as it barred the use by a free lance reporter of "what clearly should be permitted in making an accurate record of what takes place at such meetings." (p. 778.)

The Supreme Court of the State of California held in Weaver v. Jordan, 49 Cal.Rptr. 537 that communication by television falls within the constitutional protection of free speech and of the press and that the constitutional guarantee extends to both the content of the communication and the means

... (faint text) ...

STATEMENT OF [Name]

... (faint text) ...

... (faint text) ...

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employed for its dissemination which here involves a photographic representation of the proceedings. (Also see Wollam v. City of Palm Springs, 59 Cal.2d 276.) In the case of Channel 10, Inc. v. Gunnarson, 337 F.Supp. 634, the court made the statement (p. 638) that employees of the news media have a right to be in public places and on public property to gather information photographically or otherwise.

Each of the California cases just cited held invalid prior restraints amounting to prohibition as violative of the constitutional guarantees of freedom of speech and of the press. However, each case recognized the right of the public to appropriately regulate the communications media within constitutionally permissible limits and the Police Commission, of course, has the specific authority under the provisions of Section 3.500 of the Charter to regulate the conduct of its meetings. With respect to regulation, the court in the case of Nevens v. City of Chino, supra, pointed out as follows (p. 778):

" . . . It is true that a city council has an absolute right to adopt and enforce such rules and regulations as are necessary to protect its public meetings. (Gov. Code, § 36813.) For example, the council has unquestioned power to prohibit any disturbance at its meetings. Furthermore, the city could properly prevent the use of municipal electricity, or any similar product, in a recording machine operated by a reporter. And the rights of others in the audience should not be infringed; that is to say, a rule could be made that a reporter cannot occupy any more space than any other citizen. But the plaintiff says that his machine is silent and unobtrusive and that it does not interfere in any way with the meetings of the council; it is not claimed that he uses electricity of the city, or that he interferes with the auditory rights of other citizens. The court can take judicial notice that there have been developed during recent years more than one variety of noiseless tape recorder. The action of the city council is too arbitrary and capricious, too restrictive and unreasonable. . . ."

The California Supreme Court in the case of Weaver v. Jordan, supra, made the following observation (p. 544):





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" . . . As pointed out in Wollam v. City of Palm Springs, supra (1963) 59 Cal.2d 276, 284, 29 Cal.Rptr. 1, 6, 379 P.2d 481, 486, 'the right to regulate [a means of communication] does not necessarily sanction the outright prohibition.' And as stated in Shelton v. Tucker (1960) 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231, 'even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'

"Further, the freedoms of speech and of press protected by the First Amendment rest on 'the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.' (Associated Press v. United States (1945) 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013; see also Grissold v. State of Connecticut, supra (1965) 381 U.S. 479, 482, 85 S.Ct. 1678.)"

In the case of Wrather-Alvarez Etc., Inc. v. Hewicker, 147 C.A.2d 509, the court stated with respect to the rights of the press in state court proceedings that:

"The court may, within reason, regulate the conduct of members of the press or the public while they are in the courtroom. (Code Civ. Proc., § 128.) It does not appear that the trial judge predicated his order in the instant case upon the ground that the action of the petitioner in taking shorthand notes in the courtroom was disturbing the jury, the court or the orderly conduct of the proceedings. The undisputed showing indicates otherwise.

"We conclude that petitioner or his assistant is authorized at any public hearing in the court where he is rightfully in attendance to take such notes as he may desire concerning the proceedings in any form selected by him so long as it does not interfere with the orderly conduct of the proceedings before the court or its officers. (People v.



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Hartman, 103 Cal. 242 [37 P. 153, 42 Am.St.Rep. 108]; People v. Byrnes, 84 Cal.App.2d 72 [190 P.2d 290]; People v. Kerrigan, 73 Cal. 222 [14 P. 849]; People v. Letoile, 31 Cal.App. 166 [159 P. 1057].)"

While the Police Commission is not a part of the judicial system of the state and does not possess the powers of a court in that system, it does have the power and the duty not only in the interests of the officer involved but, also, in the interests of the department and the general public to insure that there is a fair and impartial public trial, that there be no disturbances at the hearing or interference with the complete and orderly presentation and reception of evidence or the deliberations of the hearing body, and that there be no infringement of the equal rights of all segments of the public to attend such meeting and hearing.

I accordingly conclude that you are empowered to adopt regulations and take such actions in connection with disciplinary hearings as are reasonably necessary to guarantee and protect the individual and public rights and interests as above outlined, but that the exclusionary action recited in your letter cannot be legally justified unless the Police Commission can find and demonstrate that such action is necessary to achieve such results and that the legitimate public objectives cannot be achieved by any less restrictive means.

You are thus advised.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



May 16, 1973

DOCUMENTS DEPT.  
SAN FRANCISCO  
PUBLIC LIBRARY

Tax Board of Review  
289 City Hall  
San Francisco, California 94102

Subject: Parking Tax Ordinance: Re Valet Service  
Charges. Appeals Nos. 62, 63, 64, 65,  
66 and 67

Gentlemen:

This letter is in response to your request of April 16, 1973 for an opinion concerning an interpretation of the San Francisco Parking Tax Ordinance (ORD. NO. 286-70) prior to the amendment effective July 1, 1972. The specific question is whether amounts paid by parking lot customers for what the parking lot operators described as "valet service labor" are subject to tax under the parking tax ordinance.

Prior to July 1, 1972, the operative provisions of the parking tax ordinance read in pertinent part as follows:

"Section 601(d) 'Occupancy.' The use or possession or the right to the use or possession of any space for the parking of a motor vehicle in a parking station."

"Section 601(g) 'Rent.' The consideration received for occupancy valued in money, whether received in money or otherwise, including all receipts, cash, credits, and property or services of any kind or nature, and also the amount for which credit is allowed by the operator to the occupant, without any deduction therefrom whatsoever."

"Section 602, Imposition and Rate of Tax. Subject to the provisions of this Article, there is hereby imposed a tax of twenty-five percent (25%) of the rent for every occupancy of parking space in a parking station in the City and County.





"The tax imposed by this Article shall be paid upon any occupancy on and after October 1, 1970, although such occupancy is had pursuant to a contract, lease or other arrangement made prior to such date.

"Where the rent is paid, or charged or billed, or falls due on either a weekly, monthly or other term basis, the rent so paid, charged, billed or falling due shall be subject to the tax herein imposed to the extent that it covers any portion of the period from October 1, 1970, and such payment, bill, charge or rent due shall be apportioned on the basis of the ratio of the number of days falling within said period, to the total number of days covered thereby. Where any tax has been paid hereunder upon any rent without any right of occupancy therefor, the Tax Collector may by regulation provide for credit or refund of the amount of such tax upon application therefor as provided in Section 614(f) of this Article."

Effective July 1, 1972, Section 602A was added to the Parking Tax Ordinance. That section reads as follows:

"Section 602A. Charges Subject to Tax. The term rent, as defined in Section 601(g), shall be deemed to include the total charges required to be paid by an occupant (including but not limited to, any valet or service labor charge) in connection with the use or occupancy of parking space; provided that nothing herein shall require the payment of parking tax on the sale of petroleum products, automobile parts, or the like, or the rendering of services (including car wash services) totally unconnected with the use or occupancy of parking space. The Board of Supervisors hereby declares its intent that from its initial enactment, the parking tax was intended to include and exclude the charges set forth in this Section 602A. The Board of Supervisors further declares that the addition of this Section 602A is not intended to make any substantive change in the Parking Tax Ordinance, but is enacted for clarification purposes only."

The question in this case arises because of a change in the policy of appellants, all parking lot operators during 1972, with respect to their advertised fee schedule.



At the time the parking tax was imposed by the Board of Supervisors, parking lot operators generally quoted a single price per unit of time for parking space rental, whether valet services were necessary or not, e.g., "first hour 65¢." An exception existed at the Airport where, unlike other parking stations, both self-parking and valet services were available. Thus at the Airport the automobile operator could park his own car in a space and not pay the posted valet charge, or permit the valet to park the car and pay separately for this additional service in addition to the base price for rental of the parking space itself.

For a six to nine month period after the parking tax was imposed, the above described pricing custom of the parking lots did not change. However, late in 1971 those lots which did not permit self-parking by the customer but utilized valet services began to distinguish in their advertising between charges for space rental and charges for valet service. The parking tax was only collected based on the space rental price; e.g., "first hour 40¢ including 25% City parking tax, valet service 25¢, total 65¢." Except for terminology, there was no substantial change in appellants' operations.

Subsequently, effective July 1, 1972, the tax was reduced from 25% to 10%, and the ordinance was amended expressly to include the valet charges within the total amount subject to the tax. The Board of Supervisors also added Section 602A as quoted previously.

It is fundamental in the field of taxation that a taxing provision is read strictly against the taxing authority and in favor of the taxpayer. However, it is also fundamental that this rule of strict interpretation does not mean that the language of the ordinance should be given an unnatural construction to defeat taxation or that the evident intention of the legislative body should be disregarded. Riley v. Havens, 193 Cal. 432; RCA Photophone, Inc. v. Hoffman, 5 Cal.App.2d 401. Thus in City of Glendale v. Crescenta Mutual Water Co., 135 Cal.App.2d 784, 801, the Court stated:

"... it must also be remembered that such a rule [taxing ordinance read strictly in favor of taxpayer] does not take precedence over other fundamental rules of statutory construction. It is fundamental that 'judicial construction should be in keeping with the natural and probable legislative purpose, and avoid conflict, and harmonize all the applicable provisions of the law on the subject if possible.'" (Citations omitted.)

It should also be observed that the appeals herein involved are not from taxpayers but from some tax collectors who improperly interpreted the parking tax in their own favor. This should certainly



dilute the effect of the rule of strict interpretation set out above.

It would be difficult to misinterpret the intention of the Board of Supervisors against the factual background of the passage of the parking tax. The custom of San Francisco parking lot operators at the lots here in question was to include all parking charges in one price and not to differentiate between space rental and valet charges. Section 601(d) of the parking tax has always defined "occupancy" to mean "the use or possession . . . of any space for the parking of a motor vehicle in a parking station." Section 601(g) then defined "rent" as "the consideration received for occupancy . . ." Clearly a person wishing to park his car where self-parking was not permitted would have to utilize the valet services provided. Such valet services would be necessary for the person to "use or possess" the parking space. The consideration he paid, a single total price, was for the actual occupancy of space and the valet services necessary to use that space. Therefore, the "consideration received" for occupancy was the total price charged by the parking lot operators. This total rental price was the amount that the Board of Supervisors intended to make subject to the tax.

No difficulty with interpretation of the parking tax ordinance occurred until the parking lot operators began separating valet charges from space rental charges. However, the form or gloss placed upon a transaction by a taxpayer is not binding upon the taxing authority, and the authority may determine the true substance of such transaction. W. E. Hall Co. v. Franchise Tax Board, 260 Cal.App.2d 179; Dealers Installation Service, Inc. v. State Board of Equalization, 13 Cal.App.3d 395. The Board of Supervisors intended to tax both space rental charges and cost for services necessary to utilization of such space rental. The language of the taxing ordinance and the facts existing at the time of its passage also support this position. Therefore, the position taken by the appellants is without merit.

Perhaps the most persuasive factor in ascertaining the intention of the Board of Supervisors is the declaration of intention made by it when the parking tax ordinance was amended. Section 602A was added by amendment to expressly include valet service charges in the rental amount taxed. The Board went on to state:

"The Board of Supervisors hereby declare its intent that from its initial enactment, the parking tax was intended to include and exclude the charges set forth in this Section 602A. The Board of Supervisors further declares that the addition of this Section 602A is not intended to make any substantive change in the Parking Tax Ordinance, but is enacted for clarification purposes only."





Applicable case law stands for the proposition that such a declaration is strong evidence of legislative intention for purposes of interpretation of statute or ordinance. Thus in Redevelopment Agency of the City and County of San Francisco v. Pacific Vegetable Oil Corp., 241 Cal.App.2d 606, 612, the Court stated:

"Statutes which are declaratory of the meaning of previously enacted legislation, while not binding on the courts, may be properly considered in determining the meaning and effect of the earlier enactment."

On the same point the Court in Stockton Savings & Loan Assn. v. Massanet, 18 Cal.2d 200, 204, stated:

"That is not giving a retroactive effect to a statute, because the meaning of the statute to be interpreted has always been the same. The subsequent legislation interpreting the statute construed, does not change the meaning; it merely supplies an indication of the legislative intent which may be considered together with other factors in arriving at the true intent existing at the time the legislation was enacted."

The declaration of intention of the Board of Supervisors thus makes very clear the scope of the parking ordinance when originally enacted. It is certainly strong authority in determining the legitimacy of the tax appeals herein involved.

The appellants also argue that the parking tax is in the nature of a second property tax, resulting in double taxation. They cite no direct authority for this proposition. It should be noted that the parking tax was closely patterned after the hotel occupancy tax approved in Gowans v. City of Bakersfield, 193 C.A.2d 79. If the appellants' argument were true, hotel occupancy taxes enacted by various California cities, including the tax approved in Gowans v. City of Bakersfield, *supra*, would be invalid. Actually, the courts have uniformly held that a tax on the use of real or personal property, measured by income or sales price, is not invalid as imposing a second property tax. Gowans v. City of Bakersfield, *supra* [Hotel occupancy tax]. Clark v. City of San Pablo, 270 Cal. App.2d 121 [License tax on apartment house]; Brantjen and Kluge v. Fincher, 44 Cal.App.2d Supp. 939 [Sales and use tax]; Hawley v. Johnson, 58 Cal.App.2d 232 [Use tax]; City of Los Angeles v. Lankershim, 160 Cal. 800 [Apartment House 704]. See also: General Motors Corp. v. Los Angeles, 5 Cal.3d 229 at 242, et seq.

In summary, then, the custom and habit of the parking industry as it existed when the parking tax was imposed is certainly





Tax Board of Review

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relevant to the intended scope of the ordinance. The language of the taxing provision when read against the relevant factual background includes valet service charges within the amount taxed. Finally, this interpretation is supported and reinforced by the declaration of intention of the Board of Supervisors. Therefore, you are advised that the parking tax has at all times included in the amount taxed any valet service charges incurred as a necessary incident to occupying car rental space. In view of my conclusion and the amount of tax revenue involved, I continue to feel that no administrative body should create the exemption sought by appellants.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



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May 16, 1973

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Mr. John D. Crowley  
General Manager  
Public Utilities Commission  
Room 287, City Hall  
San Francisco, California 94102

Subject: Authority of Water Department to Make  
In Lieu Tax Payments; Diversion of  
Unappropriated Revenues to General Fund

Dear Mr. Crowley:

This is in response to your May 11, 1973 letter which reads as follows:

"The suggestion has been made that the Water Department furnish the City an amount equivalent to property taxes were such to be levied on Water Department properties. Would you please advise on an urgency basis whether:

"A. The Water Department can make a payment to the City on any property tax basis, and

"B. What legal means there are for the Public Utilities Commission to divert unappropriated revenues to the General Fund."

A. I am enclosing a copy of City Attorney Opinion No. 836, dated May 5, 1954, which held that under the provisions of Section 1, Article XIII of the Constitution of the State of California, the Water Department has no legal liability to pay taxes to the City and County and that the Commission was without power to make an in lieu tax payment to the General Fund from Water Department revenues. I concur in the conclusion of my predecessor, Mr. Holm, for the reasons recited in his Opinion.

B. This question is answered by my Letter Opinion No. 72-35, dated May 8, 1972, a copy of which is attached. As you will

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Mr. John D. Crowley

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note from this Opinion, the receipts from each utility operated by the Commission must be appropriated in the order specified in Section 6.407 of the Charter and the only authority for the diversion of such funds to the General Fund is that contained in the provisions of subdivision (e) of Section 6.407 relating to accumulations in the surplus fund of any utility. Enclosed, for your information, is a copy of my Letter Opinion No. 67-63A, dated September 11, 1967, to the Board of Supervisors relating to transfer of surpluses in Utilities funds to the General Fund.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





May 21, 1973

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Procedures Necessary to Create a Special  
Assessment District to Provide for the  
Construction of a Community Center in the  
Diamond Heights Redevelopment Project Area

Dear Mr. Dolan:

This is in response to your request for procedures to be observed in creating a Special Assessment District to finance the construction of a Community Center on a parcel of land within the Diamond Heights Redevelopment Project Area, to be used as a private development for residents of the area.

Section 7.600 of the City Charter provides generally that where a procedure for the exercising of any rights and powers belonging to a City and County relative to the levying of special assessments to defray the whole or part of the cost of such work has been provided by statute of the State of California, such procedure shall control and be followed unless a different procedure is provided for under this Charter or by ordinance of the Board of Supervisors.

An assessment procedure for the improvement of public streets has been adopted by ordinance of the Board of Supervisors but it does not provide authority for the construction of a community center.

A review of assessment procedures provided by various statutes of the State of California does not allow for the construction of a community center as a private development. In Division 5, Chapter 2, Article VI of the Public Resources Code, commencing with Section 5350 to and including 5370, the statutes of the State of California provide for municipal park improvement district bonds. The procedures set forth in the above



Mr. Robert J. Dolan

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numbered sections provide generally that a petition, verified by one or more persons and signed by not less than 10% of the qualified electors residing in the territory which is proposed to be formed into a municipal park improvement district and generally describing the improvement to be acquired or constructed must be filed with the Clerk of the legislative body with the genuineness of these signatures verified by the Registrar of Voters. Upon the verification of the signatures the Board of Supervisors would be authorized to adopt an ordinance declaring its intention to call an election in the proposed district for submitting to the qualified electors of the district a proposition authorizing the issuance and sale of bonds, and further authorizing the Board to change or modify the boundaries of the district and the nature, character or extent of the proposed public improvement or work. The statutes provide for an ordinance of intention, the method of publication, the hearing of written protest and a specific provision that if the owners or more than one-half of the area of the property to be taxed for the work or improvement are filed, no further proceedings can be taken by the Board of Supervisors. If less than one-half of the property owners fail to protest, the Board of Supervisors may call an election to be held within the boundaries of the district. The statutes further provide that at the election two-thirds of all the voters voting must vote in favor of incurring the bonded indebtedness before the legislative body would be authorized to issue bonds of the district. Upon sale of the bonds, the funds would be deposited with the treasurer of the City. The Board is further authorized to collect a tax each year in the district sufficient to pay the interest on the bonds and such portion of the principal as is to become due before the time for making the next general tax levy.

The improvements of works so required or constructed shall be the property of the City. All costs for the election and sale of bonds shall be included in the size of the bond issue voted upon by the people in the district.

The statutes of the State of California also provide for another assessment procedure in the Park and Playground Act of 1909, with somewhat the same procedures but it also does provide that after the assessments are made the property owner must pay his total assessment within thirty (30) days or his property must be sold for delinquent payment. If he redeems within twelve (12) months after the sale, a 50% penalty would have to be paid.



Mr. Robert J. Dolan

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If the Board of Supervisors desires to implement these procedures, it is recommended that the Board refer this matter to the Recreation and Park Department, the Director of Public Works, the Registrar of Voters, the City Controller, and the City Treasurer for review and comment.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



May 21, 1973

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Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Veterans Preference in Promotional  
Examination for Class H30 Captain,  
Fire Department

Gentlemen:

This is in reference to your request for opinion whether James Olsen, a candidate in the examination for Class H30, Captain, Fire Department, is entitled to veterans preference credits. Mr. Olsen was in active military service from July 23, 1958 to July 22, 1960.

In connection with this opinion I have reviewed a letter submitted by Mr. Olsen's attorney in which he claims that the subject candidate is entitled to a veterans preference under Section 8.324(c) of the Charter. His claim is based on having served in active military service during the time in which the United States was assisting the United Nations in the Congo crisis from July 14, 1960 to September 1, 1962, and also during the period that the United States was rendering aid to South Vietnam from July 1, 1958, to July 3, 1965.

Veterans with 30 days or more actual service in time of war are entitled to veterans credits on entrance and promotive examinations under the provisions of Section 8.324 of the Charter. "Time of war" is defined in Section 8.324 and includes:

"(c) The period of time during which the United States is or has been assisting the United Nations or any nation or nations in accordance with existing treaty obligations, in active military operations against any foreign power, whether or not war has been formally declared."





Civil Service Commission

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The definition of "time of war" in Section 8.324(c) above quoted is that period of time during which the United States has been assisting the United Nations or any nation in accordance with treaty obligations in "active military operations against any foreign power."

The United States was not engaged in active military operations against any foreign power either in the Congo operations or in Vietnam during the periods claimed by the subject candidate. The United States assisted the United Nations by airlifting materials, troops and hostages to and from the Congo during the civil strife in that country. In like manner the United States assisted South Vietnam by sending military advisers to that country during the specified dates claimed by the subject candidate, but the United States was not engaged in active military operations against the North Vietnamese until March 7, 1965. (See §9.14(g)(4), Civil Service Rules.)

It is therefore my opinion that since the subject candidate was not in the military service during a period of active military operations against any foreign power, he is not entitled to veterans preference credits under the provisions of Section 8.324(c) of the Charter.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



May 21, 1973

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Transfer of Management of Civic Auditorium  
Your File No. 39-72-3

Dear Mr. Dolan:

This is in response to your request for an opinion as to what legislative changes would be required to accomplish the transfer of direct management of the Civic Auditorium and Brooks Hall to the San Francisco Convention and Visitors Bureau.

The following sections of the Charter are applicable to your question:

Section 3.510 provides in part as follows:

"Real Estate Department, which shall include the functions and personnel of the office of the right-of-way agent and also the control, management and leasing of the exposition auditorium."

Section 7.400 of the Charter provides in part as follows:

"He shall have charge of the management of the exposition auditorium."

The above quoted Charter sections specifically delegate the management of the Civic Auditorium, including Brooks Hall, to the Director of Property. This language specific in detail is a limitation on the power of the Board of Supervisors to act and as such a Charter amendment would be required in order to place the management of the Civic Auditorium and Brooks Hall in the hands of the San Francisco Convention and Visitors Bureau.

The proposed Yerba Buena Convention facilities at this time are under the direct control and management of the Chief Administrative Officer.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



May 23, 1973

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Mr. S. Myron Tatarian, Director  
Department of Public Works  
Room 260, City Hall  
San Francisco, California 94102

Subject: Financing Housing Rehabilitation Loans

Dear Mr. Tatarian:

This refers to your request for an opinion regarding the legality of the City and County of San Francisco financing the rehabilitation of private housing. Various approaches have been discussed, but this opinion will be limited to the one currently under most serious consideration, that is, direct loans to property owners.

The legality of a particular plan will, to a great extent, depend on the details of the particular plan. Realizing that you cannot work out a detailed plan without some notion of the parameters imposed by legal restrictions, however, we have agreed to provide you with an opinion based on a set of details which are currently under discussion, but which may differ from the final proposal. While this opinion may not cover your ultimate plan, it will give you a context within which to work and this office will be available to advise you further as the final plan develops.

1. Factual Context.

Your question arises because the future of federal funding for the Federally Assisted Code Enforcement (FACE) program, which has been in operation in San Francisco since 1967, is doubtful. The program has been a success in arresting the decline of several neighborhoods in San Francisco, and you are interested in exploring the possibility of continuing it, or something very similar, through City financing.

The plan currently being discussed by your staff and the staffs of other City agencies which have been involved in administration of the FACE program, the Real Estate Department and City Planning, is patterned after the existing FACE program.





Mr. S. Myron Tatarian

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Under FACE certain neighborhoods which are characterized by declining conditions are designated as FACE areas. Once a neighborhood has been designated a FACE area, all buildings in the area are inspected for Code violations, and loans and grants are made available to area property owners through the U. S. Department of Housing and Urban Development (HUD). The loans have been at 3% per annum for up to a 20-year period, and, generally speaking, have been available to home owners regardless of income. As its share of the program, the City makes public improvements in the FACE areas which are designed to improve the environment of the neighborhood. These have included such things as street reconstruction, street lighting, tree planting and undergrounding utility lines.

In the plans under discussion, after public hearings, areas of the City will be designated for participation in the Code Enforcement program; all buildings will be inspected for code violations and property owners in the areas will be eligible to borrow funds for rehabilitation, in this instance, from the City rather than HUD. The City will make needed public improvements to insure the future stability of the neighborhoods by making the total environment more attractive.

While the City will continue to make the public improvements from general funds, the property owner rehabilitation loans will be financed as follows: the City will borrow needed funds from private lending institutions at the lower rates which are made possible by the fact that interest earned on municipal obligations is exempt from federal taxes. Section 103 of the Internal Revenue Code, 26 U.S.C. §103. The City will loan the funds to property owners at a slightly higher interest rate - perhaps 1% - using a portion of the higher interest rate for administrative costs and a portion to establish a bad debt fund. The City will pledge to the bank as security for the money borrowed the amounts received in repayment of the loans made to property owners, the mortgages on the property held by the City, and the funds in the bad debt reserve. The City will not pledge the general funds and revenues of the City as security, although it may be necessary initially for the City to appropriate an amount to establish a bad debt reserve in order to borrow the needed funds. The history of the default rate in the FACE program (which I understand is extremely low) will be a basis for establishing what is needed by way of a bad debt reserve.

Although not a tangible part of the lending institution's security for the loan to the City, the City's pledge to use the borrowed funds only in neighborhoods where Code requirements will be enforced throughout, and needed public improvements made, is an assurance that property values, and thus the value of the mortgages pledged as security, will remain stable or increase.



## 2. Legal Issues.

In this general form the above proposal raises two significant legal issues:

(1) Would this financing scheme violate Article 13, Section 25 of the California Constitution (formerly Article 4, Section 31) which prohibits the State Legislature from authorizing any city and county to pledge the credit of the city and county in aid of a private purpose.

(2) Would this financing scheme violate the limitations on the City's authority to incur indebtedness found in Article 13, Section 40 of the California Constitution (formerly Article 11, Section 18), and in Section 6.304 of the Charter of the City and County.

In each instance the answer is negative. There are no general legal restrictions which would make it impossible for the City to carry out the plan for financing housing rehabilitation as proposed. I will now discuss each issue in detail.

## 3. Public Purpose.

The first issue is whether a program to finance the rehabilitation of private housing violates Article 13, Section 25 of the California Constitution which provides in pertinent part:

"The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit . . . of any county, city and county, city . . . in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever . . . . [Formerly Article IV, Section 31.]" (1)

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- (1) While the specific provisions of this section have been held not applicable to the municipal affairs of a charter city, Tevis v. City and County of San Francisco, 43 C.2d 190, 272 P.2d 757 (1954) (City Charter provided retroactive vacation allowances to municipal employees), it is not necessary to decide whether the financing of private housing rehabilitation is a municipal affair as Article 13, Section 25 is inapplicable on other grounds discussed.



Mr. S. Myron Tatarian

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The apparent loan of credit in this instance is in the City borrowing funds to reloan to private property owners. However, if the Board of Supervisors finds that there is a public purpose to be served by the City loaning funds to property owners for the rehabilitation of housing, the quoted constitutional provision is not applicable even though individuals are incidentally benefited. The decision by the legislative body that a public purpose is served is primarily a matter for legislative decision, and the decision of the legislature will be sustained if it has a reasonable basis. See County of Alameda v. Carlson, 5 C.3d 730, 488 P.2d 953 (1971) (case involving program for aid to needy children); Housing Authority v. Dockweiler, 14 C.2d 437, 94 P.2d 794 (1939) (court considered a number of challenges to local operations under federal legislation subsidizing public housing); San Diego v. Hammond, 6 Cal.2d 709, 59 P.2d 478 (1936) (determination of validity of bonds issued pursuant to an act providing for financial relief for counties; and City of Oakland v. Garrison, 194 Cal. 298, 228 P. 433 (1924) (challenged use of county funds to pave a city street as being a gift in violation of constitutional prohibition).

If the Board of Supervisors of the City and County of San Francisco makes findings that efforts to arrest the decline of, or to improve the environment in, various San Francisco neighborhoods will be aided by the housing rehabilitation financing plan you propose, and that these efforts will benefit the general welfare of the residents of the City, the public purpose of your plan will be established, and there will be no problem of conflict with the quoted constitutional provision. Given that there will probably be limited resources for the support of your program, the fact that only a limited geographical area is affected at any given time does not preclude a finding by the Board that the program will have a significant impact on preserving the desirability of San Francisco as a place to live, and thus in benefiting the general welfare.

Under Dockweiler, supra, it is clear that a municipality may properly find that it would serve a public purpose for the municipality to involve itself in meeting the housing needs of its citizens by establishing public housing. Even though the loans have come from the Federal government in the past, the FACE program itself is precedent for the use of public funds to finance the rehabilitation of private housing.

#### 4. Special Fund.

The second question is whether your plan for financing the rehabilitation of private housing through the City's borrowing funds from private lending institutions would violate the limitations on the City's authority to incur obligations found either in Article 13, Section 40 of the California Constitution, or in Section 6.304 of the Charter.





Article 13, Section 40 of the Constitution provides in pertinent part:

"No county, city . . . shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose . . ."

In the context of provisions governing disbursement in advance of revenues, Charter Section 6.304 provides in pertinent part:

"When funds shall be needed for the immediate requirements of the city and county in any fiscal year in accordance with appropriations made as authorized by this charter for such fiscal year, the board of supervisors . . . shall have power to borrow money on notes or other evidences of indebtedness on behalf of the city and county . . . . The principal amount of said notes or other evidences of indebtedness together with the interest thereon . . . shall be payable exclusively out of the taxes levied and collected by said city and county for the fiscal year during which the same are issued . . . . all notes or other evidences of indebtedness issued for money borrowed [shall be repaid in that half of the fiscal year in which they were borrowed]. . . ."

Through case law there has developed an exception to the general requirement stated in Article 13, Section 40 of the constitution requiring voter approval of indebtedness which cannot be repaid in a year. That exception is for obligations to be repaid out of a "special fund," that is, funds other than the general revenue of the City, usually obtained from property, sales, use and license taxes. The rule is not violated by obligations

". . . payable solely from a special fund, provided the governmental body is not liable to maintain the special fund out of its general funds, or by tax levies, should the special fund prove insufficient." (Citations omitted.) City of Oxnard v. Dale, 45 C.2d 729, 733, 230 P.2d 859, 861 (1955) (sewer bonds to be repaid from sewer revenues came within special fund exception).

See also City of Montclair v. Donaldson, 205 C.A.2d 201, 22 Cal.Rptr., 842 (1962) (City's plan to construct a library building to lease to county, the rental payments to be put in a fund to





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pay construction costs, was held not to violate Article 13, Section 40.)

The purpose of Article 13, Section 40 is to protect taxpayers against improvident burdens upon future tax revenues. The reason that an indebtedness which is payable only out of some "special fund" does not require voter approval as set out in this constitutional provision is that it does not impose any burden upon the general tax revenues. See City of Oxnard, supra, 45 C.2d 731-733, 290 P.2d 861, and also, City of Redondo Beach v. Taxpayers, 54 Cal.2d 126, 131-2, 352 P.2d 170, 173 (1960) (indebtedness partially payable from sales and use taxes was held payable from general fund). Property, sales, use and license taxes ordinarily constitute the general revenues of a public corporation and thus these cannot be pledged without compliance with Article 13, Section 40. See City of Redondo Beach, supra, 54 C.2d 132, 352 P.2d 174.

Under the proposal discussed here the City will pledge as security for the money borrowed from private lending institutions a fund consisting of (1) the amounts received in repayment of the loans made to property owners, (2) the mortgages which the City will hold on the property, and (3) the funds in the bad debt reserve which is to be established and funded from the interest paid by the property owners on their loans. The City will not pledge the general funds and revenues of the City as security for its loans for private lending institutions.

In short, under the proposal discussed here, the City does not plan to use tax revenue of any kind to repay the obligation. It is similar in this respect to the fund in City of Montclair, supra, where repayment of construction costs of the library was to be made from rental payments received from the county. Under these circumstances, there can be no serious question but that the fund which will be established will constitute a "special fund" bringing the proposed obligation within the exception to the general requirements of Article 13, Section 40. For other examples of "special funds," see City of Palm Springs v. Ringwald, 52 Cal.2d 620, footnote on pp. 624-5, 342 P.2d 898, footnote on p. 901 (1959) (indebtedness partially payable from sales and use taxes was held payable from general fund).

Both Charter Section 6.304, quoted above, and Article 13, Section 40 of the constitution are restrictions which apply when the City attempts to encumber the general revenues of the City: the constitutional provision controls when the indebtedness is to be repaid in a period of time in excess of one year, and the Charter provision controls when the indebtedness is to be repaid from revenue in the current fiscal year. In each case, the provision is clearly intended to protect the City's tax revenues. The reasons for excepting obligations incurred which are to be repaid from



Mr. S. Myron Tatarian

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special funds which do not include tax revenue in the case of obligations not to be repaid within a year (covered by the constitutional provision) applies equally to obligations to be repaid within a year (covered by Charter section). Thus, I conclude that neither Chapter Section 6.304, nor Article 13, Section 40, present an obstacle to your plan for financing housing rehabilitation loans so long as the City's loan agreement with the private lending institution clearly establishes that the lending institution will look only to the special fund created for repayment.

In obtaining the loans from private lending institutions it may become necessary for the City to appropriate an amount to establish a debt reserve in advance of a debt reserve accumulation from the interest paid on loans to home owners. If the funds are appropriated by the board of supervisors from the current year's revenue, and no promise is made to appropriate more funds in the future, this contribution of general funds to the loan program would not affect its legality under either Article 13, Section 40 or Charter Section 6.304.

In conclusion, I repeat, I see no generally applicable legal restrictions which would preclude the City carrying out a program for financing housing rehabilitation such as is discussed here. As the details of the program are developed, other legal issues will undoubtedly become apparent which will affect the details, of course, but those problems can be worked out as they arise.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



May 30, 1973

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Francis J. Curry, M.D.  
Director of Public Health  
101 Grove Street  
San Francisco, California 94102

Subject: Transporting Refuse Without a Permit and License

Dear Doctor Curry:

This opinion is in response to your inquiry as to the application of the requirements of the Initiative Refuse Collection and Disposal Ordinance to a private refuse collector under contract with the federal government. Your letter does not state what type of material this private collector is removing and transporting through the streets of San Francisco. Accordingly, this opinion will discuss the different situations which might arise.

The Initiative Ordinance was adopted November 8, 1932, in order to provide for the collection and disposition of refuse in San Francisco. A prior opinion, No. 64-6 of April 10, 1964, enumerates the requirements of the Ordinance:

"Under the terms of the Refuse Collection and Disposal Ordinance adopted by the people on November 8, 1932, as amended, it is unlawful for any person to dispose of refuse as defined in the ordinance except in the manner therein provided, and it is made unlawful for any person other than a refuse collector licensed by the Director of Public Health to transport through the streets or collect or dispose of refuse as so defined. Specific exceptions to the foregoing are wastepaper or other refuse having a commercial value and refuse which is incinerated by the owner of a building on the premises where produced. Likewise, debris and waste construction material are excluded from the definition of refuse as contained in the ordinance."





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Section 1 of the Ordinance defines refuse as follows:

"The term 'refuse' as used in this ordinance shall be taken to mean all waste and discarded materials from dwelling places, households, apartment houses, stores, office buildings, restaurants, hotels, institutions and all commercial establishments, including waste or discarded food, animal and vegetable matter from all kitchens thereof, wastepaper, cans, glass, ashes, and boxes and cuttings from trees, lawns and gardens. Refuse as used herein does not include debris and waste construction materials, including wood, brick, plaster, glass, cement, wire, and other ferrous materials, derived from the construction of or the partial or total demolition of buildings or other structures."

Concerning the term "commercial value," as it is used in the Ordinance, the 1964 opinion defines it as follows:

". . . the term 'commercial value' is used in the sense of sale value, and it is my interpretation of the clause that the term is used therein in the sense of sale value to the owner, who is the person whose rights are being regulated by the section."

Accordingly, this term is not used in the sense of commercial value to the refuse collector. Furthermore the opinion states that if the owner or producer of such wastepaper or other refuse regards the material as worthless and of no further value or use, then such material does not have a commercial value. Consequently, such refuse must be collected by a licensed refuse collector in accordance with the provisions of the Ordinance.

If the Department of Public Health determines that the private refuse collector here is transporting through the streets of San Francisco refuse as defined in Section 1, then the question arises as to whether he is subject to the Ordinance, even though he is under contract to the federal government. Specifically, the legal question is whether the City and County of San Francisco can regulate an independent contractor, working exclusively for the federal government, when he is transporting garbage through



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the streets of San Francisco.

The United States Supreme Court stated, in Railway Mail Ass'n. v. Corsi, 326 U.S. 88; 65 S.Ct. 1483 (1945):

"Government immunity from state tax and regulatory provisions does not extend beyond the federal government itself and its governmental functions. In the regulation of its internal affairs, the state inevitably imposes some burdens on those dealing with the national government of the same kinds as those imposed on others."

Since 1945 numerous decisions have discussed the question: Where an independent construction contractor was working exclusively on federal property, state licensing provisions, permit requirements, and inspection procedures have been held inapplicable. (See Leslie Miller, Inc., v. Arkansas (1956) 352 U.S. 187, 1 L.Ed.2d 231; Birmingham v. Thompson (1952, C.A.5th Ala.), 200 F.2d 505; Oklahoma City v. Sanders (1938, C.A.10th Okla.), 94 F.2d 323.) The rationale for these cases was that Congress had exclusive power to legislate in relation to property purchased by the federal government with the consent of the state in which the property was located.

In other cases local regulations were held applicable to such independent contractors. (See James Stewart & Co. v. Sadrakula (1940) 309 U.S. 94, 84 L.Ed. 596; Public Housing Administration v. Bristol Township (1956, D.C.Pa.), 146 F.Supp. 859.) These cases relied upon the theory that the contractor engaged in work for the federal government has no governmental immunity and is accordingly subject to local regulations unless Congress provides otherwise.

Concerning the application of the Initiative Ordinance provisions to the independent garbage contractor, those provisions concerning the transportation of "refuse" through the streets would be applicable. Thus, this situation is distinguished from those cases where the state or municipality attempted to regulate activity on federal property.

Finally, it is well settled that a municipality has broad powers in the regulation of the use of streets. Opinion No. 64-6 enumerates the supporting authority and places emphasis upon the case of People v. Galena, 24 C.A.2d Supp. 770, 775, which states:



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"Streets and highways are for the use of the traveling public, and, as members of the public, all persons in like situation have equal rights to use the streets and highways in a reasonable manner in the customary way. (13 Cal.Jur. 371.) However, the common right to use streets in the ordinary way is quite different from the right to use them as a place of business for private gain. Ordinary usage is the right of all, but there is no vested or constitutional right to subject a street to the conduct of private business. Such use, when authorized, is a special or extraordinary privilege. It is an added easement or burden on the street, and is not comparable to the right to conduct lawful business on private property. Use of a public street for private enterprise may under some circumstances redound to the public good; but nevertheless it is a special privilege peculiarly subject to regulation, and one which may be granted on reasonable terms or entirely withheld."

You are accordingly advised that if it is determined that the private refuse collector is transporting "refuse" through the streets of San Francisco, then such collector is subject to the appropriate permit and license requirements of the Initiative Ordinance.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



May 30, 1973

Mr. James T. Rodman, Foreman  
San Francisco Grand Jury  
Room 165, City Hall  
San Francisco, California

Subject: Interim Report on the San Francisco  
Unified School District

Dear Mr. Rodman:

This refers to the May 19, 1973, Grand Jury Interim Report on the San Francisco Unified School District relating to contracts with Educational and Recreational Services, Inc. (ERS) for the bus transportation of children in the San Francisco elementary schools.

You state that the City Attorney should determine

(a) Whether the 1971 Modification to Contract No. 794 was lawfully made.

(b) Whether ERS is in breach of its contractual obligations to maintain schedules.

(c) Whether Contract No. 794 has been unlawfully assigned by reason of the so-called "merger" and whether there ever was a merger between M & M and ERS which transferred Contract No. 68350 to ERS for the purposes of the 1972 Modification between ERS and the District.

(d) Whether there have been any violations of the anti-trust laws.

With respect to (b) on the question of breach of contract obligation to maintain schedules, the Board of Education may direct the Superintendent of Schools to develop a complete and comprehensive report on this matter in order for the Board to determine a proper course of action.





Mr. James T. Rodman

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With respect to (c) and (d) on questions regarding merger and possible violations of antitrust laws, any conclusion would usually be based on extensive examination of pertinent documents and interviews or testimony of witnesses and would involve utilization of investigatory powers. I will be glad to discuss appropriate procedures with you.

This letter is directed to advice on (a) whether the July 1, 1971 modification to Contract 794 was lawfully made in view of the fact that this contract was not let out to public bid.

It may be initially noted that the objective of the statutory provision relating to solicitation of bids for school bus contracts (Section 16802 of the State Ed. Code) is to secure the lowest price "consistent with proper and satisfactory services" and that this statute unlike other bidding statutes contains a provision "that the governing board may let the contract for the service to other than the lowest bidder." Thus, if the formal bid procedure had been followed the revised contract could have been let to ERS if the School Board determined that it was in a position to furnish the most proper and satisfactory service even if it was not the lowest bidder. However, the background and circumstances existing at the time of the execution of this particular contract indicate that, as a legal matter, the selection of a contractor under a bid process procedure was not required. The Legal Adviser to the Board of Education and I advised the School Department and City Purchaser to this effect on well established legal principles prior to the time of the execution of the contract. A chronological review of this background follows:

#### BACKGROUND

On March 13, 1970, an invitation for bids to furnish bus transportation, as required for pupils and personnel of the San Francisco Unified School District, was advertised and was mailed directly to a number of transportation companies.

On April 13, 1970, of the two bids received, the bid from ERS was lower and ERS documented considerable past and present experience in the school bus transportation business.

On May 22, 1970, Contract 794 was executed between the District and ERS. This contract is a requirements contract intended by the parties at the time to service 20 elementary schools in the Richmond and South Park Complexes.



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On July 24, 1970, suit was filed by the National Association for the Advancement of Colored People (NAACP) in the United States District Court against the School District, alleging racial imbalance in the elementary schools.

On September 22, 1970, the District Court set aside the submission of the case for the purpose of awaiting the decision of the United States Supreme Court in Swann v. Charlotte-Mecklenburg Board of Education (402 U.S. 1) involving the question of constitutional validity of court orders requiring busing of school children. The Supreme Court issued its opinion in the Swann case on April 20, 1971, which upheld transportation of pupils by bus as one method of achieving racial balance in the schools.

On April 28, 1971, the District Court ordered the District to file plans by June 10, 1971, for racial balance of all San Francisco elementary schools to commence at the start of the 1971 Fall school term. The School District immediately presented motions for a stay of the order both in the District Court and in the United States Court of Appeals. These motions were denied.

On June 21, 1971, the District and NAACP filed plans. These plans differed in a number of details but both involved busing of school children and covered the 104 schools. The District Court thereafter heard testimony regarding both plans.

On July 9, 1971, the District Court issued a final judgment approving both the District and the NAACP plans and ordered the schools to be racially balanced by September 8, 1971. Motions to stay this judgment were filed in the U. S. Court of Appeals and in the U. S. Supreme Court. Both motions were subsequently denied.

In June, 1971, District personnel held meetings with the contractor for the purpose of discussing the need for additional buses required by its proposed plan filed with the court. This office was informed that the contractor stated it could not provide the number of additional buses required, nor at the prices provided for in the contract, and requested further negotiations as to price, and the District obtained cost figures from the contractor to support its contention.

On June 17, 1971, the Board of Education was advised by District personnel that significant additional amounts of money would be required as a result of any court order requiring full racial balance of the 104 elementary schools since plans would call



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for a great increase in the number of buses which would be required. The Board approved a resolution authorizing the Superintendent and the School District to negotiate and enter into a further contract with ERS.

School District and Purchaser office personnel advise that immediately after June 17 contacts were made with the Municipal Railway and various bus transportation companies to determine whether the Railway or other various operators had buses available if the contractor could not supply the additional buses. The results were negative. After the court order was made, School District and Purchaser personnel were convinced that the period of eight weeks was too brief a period within which to prepare for and advertise for bids for a new contract by reason of these previous meetings and knowledge of the time requirements involved in order to obtain bids and execute a contract under the competitive bid procedure process. In addition, they state that it was necessary for a contractor to furnish personnel and to work with the District for at least 30 days in preparing schedules, routes, pick-up locations and go through dry runs in order to establish route times for each of the 104 schools. A contractor also had to obtain buses, hire and obtain drivers and obtain insurance, licenses, security guards and other personnel.

In view of all the above circumstances, it is my opinion that the School District had the legal power under the circumstances to enter into a modification to Contract 794 with the contractor because it was their reasonable opinion under the facts that this was the only method by which the hugely augmented busing program could be put into effect on September 9, 1971 as required by the court order of the United States District Court.

#### LEGAL ISSUES

Contract 794 of May 22, 1970, is a binding contract for five years. The contract bid proposal which became part of the contract provided "other transporting of pupils and personnel may be done under this contract at contract prices by mutual agreement, or in the event that services are desired for which prices have not been established such services may be contracted for, by mutual agreement, at prices to be agreed upon and which are related to prices herein." Further, the situation which existed prior to July, 1971 show that an advertisement for bids and selection of contractor under a bidding process for a contract to commence in September, 1971 to the extent and magnitude required by the court order would be unavailing to procure suitable bids. In fact, it was clear that it would be impossible to obtain any







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bids for such a contract and the School District was confronted with an emergency situation.

If the contract entered into on July 1, 1971, is viewed as a modification of Contract 794, originally entered into on May 22, 1970, it is my opinion that the modification comes within the term of the original contract as a matter which can be made subject to a negotiation between the District and the contractor without the necessity of going through the bid process in view of the provisions in the bid proposal above set forth. If the contract of July 1 is viewed as a novation, or a new contract, it is my opinion that the District was justified as a legal matter in negotiating this contract without going through the bid process because of the factual background and circumstances outlined above, which show that the results of a bid process would be negative, unavailing and any bid would be practically impossible to obtain. The School District was justified in believing that an emergency situation was presented. Under these circumstances, the legal authorities declare the principle that the bid procedure is not required before a public entity can negotiate a contract which under ordinary circumstances must be entered into only after advertisement and notice, public bid procedures and award to the lowest and best bidder. (See: Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348; Mullins v. Henderson, 75 C.A.2d 117; Hodgemen v. City of San Diego, 53 Cal.App.2d 617; County of Riverside v. Whitlock, 22 C.A.3d 863; Bent Bros. Inc. v. Campbell, 101 C.A. 456.)

You are so advised.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



May 31, 1973

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PUBLIC LIBRARY

Mr. James T. Rodman, Foreman  
San Francisco Grand Jury  
165 City Hall  
San Francisco, California 94102

Subject: San Francisco Unified School District  
Legality of Janitorial Services by  
Contract

Dear Mr. Rodman:

In response to your request for my opinion as to whether the San Francisco Unified School District is legally able to provide for janitorial services by contract with a private concern, I submit the following:

Janitors working for the San Francisco Unified School District are noncertified (i.e., nonteaching) personnel. The terms of both the California Education Code Section 13756 and the San Francisco Charter Section 5.100 specifically require that non-certified personnel who are employed by the school board be subject to the civil service system established by the City and County of San Francisco.

The statutory and charter provisions are mandatory and require that janitorial positions be filled by civil service personnel. This requirement cannot be circumvented by contracting with a private concern for janitorial services. Burum v. State Comp. Ins. Fund (1947) 30 C.2d 575; Stockburger v. Riley (1937) 21 C.A.2d 165. In the case of Calif. School Employees Association v. Willits Unified School Dist., 243 C.A.2d 776 it was specifically held that the functions of school janitors must be performed by employees.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



May 31, 1973

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Mr. Thad Brown  
Tax Collector  
107 City Hall  
San Francisco, California 94102

Subject: Business Tax/Payroll Expense Tax  
Delancey Street Foundation

Dear Mr. Brown:

This is in response to your request for an opinion from this office concerning the taxability of the Delancey Street Foundation under (1) the Business Tax Ordinance (Ordinance No. 245-68) and (2) the Payroll Expense Tax Ordinance (Ordinance No. 275-70).

Based upon information furnished to me, it would appear that the Delancey Street Foundation operates some five businesses in San Francisco which compete with businesses which do not qualify as nonprofit businesses. The Delancey Street Foundation is incorporated under the general nonprofit corporation law of the State of California and its Articles of Incorporation provide that " . . . this corporation is irrevocably dedicated to charitable purposes and no part of the net income or assets of this organization shall ever inure to the benefit of any director, officer or member . . . or . . . any private individual."

The organization has received a ruling from the Internal Revenue Service that it is exempt from federal income tax, under Section 501(c)(3) of the Internal Revenue Code of the United States; and also has received a ruling from the Franchise Tax Board of the State of California that it is exempt from California franchise or income tax under Section 23701d of the Revenue and Taxation Code. It is my understanding that the Delancey Street Foundation makes no expenditures by way of cash, check or the like to persons who operate its businesses.

With respect to the Business Tax Ordinance, it is my opinion that the Delancey Street Foundation is liable, with



Mr. Thad Brown

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respect to each of its businesses, for minimum tax of \$24.00 per year, as imposed by Section 4.00 (Fixed Place of Business). However, there would be no additional tax on the gross receipts of the Delancey Street Foundation from its various businesses.

Section 3 of the Business Tax Ordinance (Imposition of Tax - Registration) provides in pertinent part:

" . . . a business tax must be paid by every person engaged in any of the businesses specified in Section (sic.) 4.00 through 4.13 inclusive, or Section 4.15 of this ordinance within the City and County, and a business tax is hereby imposed in the amount prescribed in the applicable provision."

Section 4.00 of the ordinance (Fixed Place of Business) provides in pertinent part as follows:

" . . . for every person maintaining an office or other fixed place of business in the City and County of San Francisco, there shall be a minimum tax of \$24.00 per year, whether or not any gross receipts of such person are derived from or attributable to the business activities engaged in by such person in the City and County of San Francisco; provided, however, that where the gross receipts of any such person are subject to tax under any of Sections 4.01 to 4.13 inclusive or under Section 4.15 hereof, this section shall not be applicable to such person."

Section 2.6 (Gross Receipts), and particularly subsection 2 thereof, provides in pertinent part as follows:

" . . . the term 'gross receipts' does not include . . . receipts of . . . corporations organized and operated for . . . charitable purposes not conducted for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual."

Under these sections, a business tax must be paid by the Delancey Street Foundation for each of its separate businesses. However, since the organization qualifies as a "corporation organized and operated for . . . charitable purposes, not conducted for profit, and no part of the net earnings of which





Mr. Thad Brown

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inures to the benefit of any private shareholder or individual," gross receipts are exempt from the business tax. However, it is liable for the minimum tax, not measured by gross receipts, of \$24.00 per year for each of its various businesses.

With respect to the Payroll Expense Tax Ordinance, it is my opinion that the Delancey Street Foundation is subject to tax to the extent it incurs expenditures by way of cash, check or the like to compensate individuals employed in business activities unrelated to the charitable purposes of the Delancey Street Foundation.

Section 3 of the ordinance (Imposition of Payroll Expense Tax) provides in pertinent part as follows:

"A tax for general revenue purposes is hereby imposed upon every person who, in connection with his business, engages, hires, employs or contracts with one or more individuals as Commission Merchant or Employee, to perform work or render services in whole or in part within the City and County of San Francisco.

"The amount of such tax . . . shall be one (1%) percent of the payroll expense of such person; provided, that such tax shall be levied only upon that portion of payroll expense which is attributable to the City and County of San Francisco as set forth in Section 4."

Section 6 of the ordinance (Exempt Organizations) provides, in pertinent part, as follows:

"(a) Except as provided in subsection (b) of this section, an organization described in Section 501(c) or 501(d) or 401(a) of Title 26 of the United States Code, as qualified by Sections 502, 503 and 504 of Title 26 of the United States Code, shall be exempt from taxation under this ordinance.

"(b) An organization otherwise exempt from taxation under subsection (a) of this section, if it receives unrelated business receipts, shall pay a Payroll Expense Tax equal to the amount arrived



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at by multiplying the tax which would have been due under this section if the organization were not an exempt organization by the percentage which its unrelated business receipts bear to its total receipts."

Under these sections, every corporation which employs individuals to perform work or render services within San Francisco is subject to tax at the rate of one percent of its payroll expense attributable to San Francisco. Charitable corporations exempt under Section 501(c) of the Internal Revenue Code are exempt from tax, except to the extent that the corporation receives "unrelated business receipts." The "unrelated business" and "unrelated business income" (and by analogy the term "unrelated business receipts") have a well-defined meaning under the Internal Revenue Code.

Briefly, an "unrelated business" is "any . . . business, the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) of the exercise or performance by such organization of its charitable . . . purpose or function constituting the basis for its exemption." (Internal Revenue Code, § 513.)

In at least one case involving a charitable corporation organized for purposes of providing vocational training of unemployed and underemployed individuals, the Internal Revenue Service has indicated that the question is whether the charitable corporation's allegedly "unrelated business" constitutes "an end in itself or . . . the means by which it accomplishes a charitable purpose other than through the production of income." (Rev. Rul. 73-128.)

Irrespective of the above mentioned factors, Section 513(a) of the Internal Revenue Code specifically provides that the term "unrelated . . . business" does not include any business in which "substantially all the work in carrying on such . . . business is performed for the owner without compensation."

This office previously has advised you that the term "payroll expense," as used in the Payroll Expense Tax Ordinance, should be interpreted to include only those payroll expenditures in the form of cash, check or the like. Accordingly, if the Delancey Street Foundation has no "payroll expense" in the usual sense of that term, there is no payroll expense tax.



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Based upon my understanding that the Delancey Street Foundation, in connection with its operation of some five businesses in San Francisco, does not incur any "payroll expense" in the form of cash, check or the like, it is my opinion that the Delancey Street Foundation is not liable for tax under the Payroll Tax Ordinance.

In summary, based upon the factual data which has been transmitted to me, it is my opinion that the tax liability of the Delancey Street Foundation under the Business Tax Ordinance (Ordinance No. 245-68) and Payroll Expense Ordinance (Ordinance No. 275-70), is limited to an amount equal to the minimum tax imposed by the Business Tax Ordinance of \$24.00 per year for each of its various businesses engaged in within San Francisco.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





April 27, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Ordinance Regulating Obstructions  
on Public Streets  
(Your File No. 473-71)

Dear Mr. Dolan:

This responds to your letter of March 19 transmitting Supervisor Feinstein's request for legislation regulating obstructions and encroachments on public streets. The request was not specific as to what encroachments or obstructions require regulation. There is presently considerable legislation dealing with various types of street and sidewalk uses.

Section 63 of the Police Code makes it unlawful for any person, firm or corporation to place upon the sidewalk any article or substance which would obstruct the passage of the street or sidewalk for more than one hour. Article 8 of the Public Works Code prohibits excavation in the street or sidewalk without permission of the Department of Public Works. Article 16 of the same code regulates the planting of trees, shrubs and ground covers in street and sidewalk areas. Article 19 of the same code regulates the location of public telephone booths on public sidewalks.

Embodied in Article 18 of the Public Works Code are regulations for various other sidewalk and street uses. Section 708 of that Article requires Department of Public Works permission for sidewalk improvements. Section 723 prohibits obstructions of the streets. Section 723.1 allows certain sidewalk barriers with department permission. Section 724 allows temporary occupancy of streets with department permission. Section 725 et seq. regulates the location and use of debris boxes. Section 724.3 provides that encroachments on the public streets may only be authorized by the Board of Supervisors.



Mr. Robert J. Dolan

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April 27, 1973

Article 44 of the Building Code regulates for the protection of pedestrians the use of streets and sidewalks for construction and demolition. Article 45 of this code regulates the permanent occupancy of public property including streets and sidewalks.

Under the provisions of the legislation above mentioned the City generally requires permits for all construction and encroachments on the City streets and sidewalks. The City can and does impose conditions on the granting of various permits.

Your letter specifically requested that Municipal Railway inspectors be empowered to cite violators who impede transit flow. It is the present practice to have Municipal Railway inspectors appointed as special policemen by the Chief of the Police Department. These inspectors are authorized to cite automobiles illegally parking in bus zones and to request the removal of vehicles obstructing the flow of Municipal Railway vehicles.

As there is already considerable legislation regulating this field, it is not possible to draft additional legislation without being advised in more detail as to what obstructions are to be regulated.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



May 30, 1973

Francis J. Curry, M.D.  
Director of Public Health  
Central Office  
101 Grove Street  
San Francisco, California 94102

Subject: Department of Public Health Employees;  
Applicability of Federal Fair Labor  
Standards Act

Dear Dr. Curry:

In answer to the three questions which you pose in relation to the applicability of the Federal Fair Labor Standards Act of 1938 to employees holding one job with the Department of Public Health and another job with another department of the City and County of San Francisco, I submit the following:

1. Is the City, for purposes of the Wage and Hour Law, a single employer?

The Fair Labor Standards Act is found in Title 29, Chapter 8 of the United States Code at 29 USCA 201 et seq. Section 207 of this act requires specified employers to pay their employees time and a half for any hours worked in excess of forty hours per week. Section 203 defines the term employer to include the City and County of San Francisco in respect to those employees working--

" . . . (1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or . . ."



Francis J. Curry, M.D.

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May 30, 1973

As to all other enterprises and functions, the City is not an employer under the terms of the Act. 29 USCA 203(d). However, the City is not unique in being covered by the Act in relation to only a portion of its activities and employees. The same situation obtains in respect to private corporations whose activities are only partially covered by the Act. Mabee v. White Plains Publishing Co., 327 US 178, 66 S.Ct. 511, 90 L.Ed 607 (1945). 29 Federal Code of Regulations 776.3.

If a City employee performs the work set forth in 29 USCA 203(r)(1) above, then as to that employee the City is covered by the Act with no differentiation of the various activities carried on by the City.

2. Would an employee accepting part-time employment in addition to his regular employment, even though he worked in two departments in the City government, be entitled to overtime?

29 USCA 207(a) requires that any employee who "in any workweek" performs duties which bring such employee under the beneficial protection of the Act be paid time and one-half for all hours worked over forty. There is no distinction made as to work performed which is covered by the Act and work which is not. 29 Federal Code of Regulations 776.3 and 776.4. If a City employee works for the Department of Public Health in a hospital or other enterprise mentioned in 29 USCA 203(r)(1), either full or part time, and for another City department, either full or part time, the federal Act requires that said employee be paid overtime as set forth therein.

3. Are we correct in refusing to sign the documents permitting such extra employment?

While federal law enjoins the payment of overtime as outlined above, Section V, the Salary Standardization Ordinance 1973-1974, specifically prohibits said payment for part-time positions. By refusing to authorize such extra employment for employees involved in those activities set forth in 29 USCA 203(r)(1) you are but performing your legal duty.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





June 1, 1973

Francis J. Curry, M.D.  
Director of Public Health  
Department of Public Health  
101 Grove Street  
San Francisco, California 94102

Subject: Whether a Hearing Can be Held  
to Set Aside a Resignation

Dear Dr. Curry:

This is in reply to your request for opinion asking what action you should take with respect to the request of a former limited tenure employee of your department (Bradley Borel, 2592 Rehabilitation Program Worker II) for a hearing to set aside his resignation.

The subject employee resigned from his position on May 10, 1972, and his resignation was accepted by you and approved by the Civil Service Commission.

Rule 28, Section 2 of the Civil Service Rules was in effect at the time of the resignation. It provided:

"Section 2. ACCEPTANCE AND APPROVAL OF  
ACCEPTANCE: Before a resignation shall become effective, it must be accepted by the appointing officer, and its acceptance must be approved by the Civil Service Commission or the General Manager, Personnel, thereof. After a resignation has been accepted by the appointing officer, it shall immediately be forwarded to the Civil Service Commission. When a resignation has been approved by the Civil Service Commission or the General Manager, Personnel, thereof, the separation shall be final and cannot be reconsidered."



Francis J. Curry, M.D.

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June 1, 1973

Under the provisions of the above quoted rule, the resignation of the subject employee was final when accepted by you and approved by the Civil Service Commission; and it cannot be reconsidered. It is therefore my opinion that you have no authority to conduct a hearing or take action to reconsider the resignation.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



June 4, 1973

Mr. James F. Wurm  
Assistant General Manager, Personnel  
Civil Service Commission  
151 City Hall  
San Francisco, CA 94102

SUBJECT: May Class of 4374 Tax Administrator be Included  
in 1973-74 Salary Standardization Ordinance  
Because of Clerical Error of Omission.

Dear Mr. Wurm:

You have asked for my opinion as to whether the class of 4374 Tax Administrator may be included in the 1973-74 salary standardization ordinance by amendment because of a "clerical error of omission."

Ordinance No. 107-73, the 1973-74 Salary Standardization Ordinance, was adopted by the Board of Supervisors, pursuant to Charter Section 8.401, on March 29, 1973. It contains a salary rate for the class of Tax Collector but none for the class of Tax Administrator.

By Ordinance No. 136-73, adopted on April 12, 1973, the 1972-73 Salary Ordinance was amended to abolish the position of Tax Collector and establish the classification of Tax Administrator with the appropriate compensation as recommended by the appointing power pursuant to Charter Section 8.400(b). At the same time Ordinance No. 137-72 was passed which appropriated the funds necessary for the creation of the position of Tax Administrator. In addition, the latter ordinance contained a provision making it effective retroactively to November 29, 1972.





Mr. James F. Wurm

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June 4, 1973

However, under Charter Section 8.401 a schedule of compensations and amendments thereto must be adopted by April 1 in order to become effective at the beginning of the next fiscal year and a schedule of compensations and amendments thereto which are not adopted by April 1 do not become effective until the beginning of the second succeeding fiscal year. In Miller v. City and County of San Francisco, 174 Cal.App.2d 109 (1959) it was contended by the class of maintenance machinists, subsequent to April 1, that their 1955 pay schedule should not be set under Charter Section 8.403, as it had been, but under Section 8.401 as the craft rate was no longer the prevailing rate. Even though it was conceded that the contention was correct, the court held that it was then not possible to fix a 1955 rate of pay under Section 8.401 because that section expressly declares that the Board of Supervisors must adopt salary schedules under Section 8.401 each year not later than April 1, to become effective on July 1 next following and the rates adopted April 1 do not become effective until July 1 of the next succeeding calendar year. The court further stated that it was impossible under the Charter to give relief that could be effective prior to July 1, 1956.

In the present matter, the position of Tax Administrator was not included in the salary standardization survey or made subject to the procedures for standardizing salaries under Charter Section 8.401 and no schedule of compensation was established in the Salary Standardization Ordinance enacted prior to April 1 of this year for the reason that the position was not actually established until April 12. The making of the appropriation for the position retroactive does not cure the omission or turn such omission into a clerical error. In order for there to be a clerical error the omission would have to be the result of inadvertently leaving out an existing class whose salary schedule had been determined. All that the retroactive provision accomplished was to permit payment of the higher rate of compensation for Tax Administrator in the current fiscal year from an earlier date.



Mr. James F. Wurm

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June 4, 1973

You are advised therefore that the 1973-74 Salary Standardization Ordinance cannot be amended to include the position of Tax Administrator at this time as a clerical error of omission so as to be effective July 1.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



June 5, 1973

Honorable Dianne Feinstein  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Pawnbrokers, Secondhand Dealers,  
and Sale of Firearms - Permits

Dear Supervisor Feinstein:

You asked whether the "automatic" transfer of a pawnbroker's license in accordance with Section 2823 of the San Francisco Police Code must include a secondhand dealer's permit or a gun sale permit.

In answer to the second portion of your question, permits for retail dealers in firearms are issued pursuant to the State Penal Code (section 12000 et seq.) rather than by ordinance, and the area has been preempted by state legislation. (Government Code §53071. See Sippel v. Nelder (1972), 24 C.A.2d 173.)

You may recall that, in 1968, this office prepared an ordinance requiring persons owning guns to register them with the police. Although that ordinance was upheld at the level of the California Supreme Court (Galvin v. Superior Court (1968), 70 Cal.2d 851), the state legislature, in response to that same action, passed (in 1969) what has since become Government Code Section 53071, which declared an intent to completely regulate the licensing and registration of concealable firearms.

It is well established that where general law contains express provisions indicating that the legislature intends to occupy the whole field of regulation on any given subject, and actually implements such intention by providing for some regulation, local legislation relative to the same subject matter is prohibited. (Ex parte Daniels, 183 Cal. 636, 641-642; Pipoly v. Benson, 20 Cal.2d 366.) Therefore, as the legislature has expressly set forth its intention to occupy the whole field of regulation of firearms, and has coupled this expression with state regulation of the sale and registration of firearms, local regulation in this area is precluded.



Honorable Dianne Feinstein

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June 5, 1973

However, section 12071 of the State Penal Code vests a discretion in a duly constituted licensing authority of a city (in San Francisco, the Chief of Police) to issue a license to sell concealable weapons at retail, and this section provides that such business license shall be carried on only in the building designated in the license. Police Code Section 2823 would have no effect on this power vested in the Chief of Police; therefore, the issuance of a new license to sell concealable weapons in a pawnbroker's new location is a matter within the Chief of Police's discretion.

With regard to the secondhand dealers' permits, it is the opinion of this office that such permits necessarily follow the pawnbrokers' permits insofar as Article 28 of the Police Code contemplates that the sale of secondhand goods, wares or merchandise is a necessary part of the conduct of the business of pawnbroking. (See §§2810, 2811 and 2813.) Endorsement of a change of address upon a previously issued pawnbroker's permit, the obtaining of which is regulated by much more specific and stringent provisions than is a secondhand dealer's permit, should include a similar endorsement upon the previously issued secondhand dealer's permit.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





June 5, 1973

Mr. Richard A. Bobier  
Port of San Francisco  
Ferry Building  
San Francisco, California 94111

Subject: San Francisco Port Commission  
Charter Amendment, Section 3.581, et seq.

Dear Mr. Bobier:

With reference to the amendment to subdivision (4) of Section 3.584 proposed in your May 31, 1973, letter to the Board of Supervisors, I believe that the language proposed is susceptible of the possible interpretation that tax or general revenue appropriations for port operations are to be repaid from the Port's share of excess revenues.

It is my opinion that the amendment should not reflect that the repayment is being made from "excess revenues" but that it should reflect that tax or general revenue appropriations to the Port are to be considered as obligations incurred for necessary Port operating expenses which are to be deducted as an accounting matter from revenues, and repaid if there are sufficient funds available, before there is a determination that there are excess revenues subject to the 15%-85% sharing formula provided by the Burton Act.

I am accordingly attaching hereto a proposed amendment to subdivision (4) of Section 3.584 in substitution for the one proposed in your letter and also a corresponding amendment to Section 6.406 of the Charter. I do not believe that these amendments would present any problem under the Burton Act as the City would merely be setting forth in its Charter the conditions under which it will appropriate tax or general revenue funds for Port operations and these conditions would be accepted by the Legislature in its ratification of the Charter amendment.

If the amendments as proposed by me are agreeable with you, you may recommend them to the Board of Supervisors or, if



Mr. Richard A. Bobier

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you wish, you can indicate to me your approval of the text and I will suggest the amended language to the Board of Supervisors when I make my report on the Charter amendment as requested by the Board.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



PROPOSED AMENDMENT TO LANGUAGE OF SECTION 3.584(4)

(4) Sharing of Excess Revenues. In the event that the City and County of San Francisco shall, by appropriation or allocation, make available for Port use or benefit funds raised by tax levy or obtained in any manner from the general revenues of the City, such sums so appropriated or allocated shall be deemed to be obligations incurred for necessary operating costs and expenses directly related to the operation of the maritime activity of the Port for the purpose of the determination of excess revenues of the Port as set forth in Statutes 1968, chapter 1333, § 8, and Port shall repay the City the sums therefore allocated or appropriated from funds raised by tax levy or obtained from general revenues prior to the sharing of any excess revenues from Port operations with the State as provided in said statute, such repayment to be made in accordance with the priorities specified in section 6.406 of this charter for the appropriation of Port funds.

PROPOSED AMENDMENT TO SECTION 6.406

Add a new subsection (f) which shall read as follows and re-number existing subsections (f), (g) and (h) as (g), (h) and (i):

(f) For repayment to the City and County of San Francisco of funds allocated or appropriated for Port use or benefit which were raised by tax levy or obtained in any manner from the general revenues of the City.





June 5, 1973

Honorable Dianne Feinstein  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Amendment to Cablevision Franchise  
Ordinance Regarding Extent of  
Cablevision Service

Dear Supervisor Feinstein:

This is in reply to your request for an amendment to Ordinance No. 105-64 which granted to Television Signal Corporation a franchise to operate a cablevision system in the City and County of San Francisco. Specifically, your request is to the effect that the ordinance in question be amended to provide that the franchise be required to extend its services to lesser affluent areas as a condition for continued new construction in the more affluent areas of the City.

Television Signal Corporation's (hereinafter TSC) franchise (Ord. No. 105-64) is nonexclusive, does not specify in what geographic areas the franchisee may or must provide service and does not require that the franchisee's construction plans must be approved by the City and County before construction is to commence.

As between the City and County of San Francisco and TSC the ordinance granting the franchise in question constitutes a contract. Gurtz v. City of San Bruno (1935) 8 C.A.2d 399, 400. Rights vested in an individual or a corporation under an executed franchise are contractual and such rights cannot be impaired by any subsequent enactment by the legislative body of the grantor,



Honorable Dianne Feinstein 2

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inasmuch as the federal and state constitutions forbid the enactment of laws by states and local municipalities which would impair the obligations of contracts. County of Tulare v. City of Dinuba (1922) 188 C. 664, 669.

Adoption of an amendment to the ordinance such as you propose would alter the contractual obligation of TSC and quite reasonably could be interpreted to "impair" the contractual rights of the franchisee.

However, this constitutional prohibition against the passage of laws impairing contractual obligation is subject to one pertinent qualification. That qualification is, that contractual rights, like all other forms of property, are held subject to the valid exercise of the police power. DeHaviland v. Warner Bros. Pictures (1944) 67 C.A.2d 225, 235, 236. The result of this exception is that those provisions of the constitution prohibiting the passage of legislation which would impair contractual obligations have no application in an instance where the police power is properly exercised. Odd Fellow's Cemetery Association v. San Francisco (1903) 140 C.226, 235.

A public entity cannot contract away its police power and it is presumed that the parties to a contract enter into said agreement being fully aware of the inherent right of the municipality to exercise its police power for the protection of the public peace, safety, health and morals. Mott v. Kline (1927) 200 C. 434, 446.

What constitutes a valid exercise of the police power is a question not easily susceptible to a concise answer. However, the California Supreme Court, in State of California v. Marin Municipal Water District (1941) 17 C.2d 699 at page 706 defined such exercise thusly:

"The determination of whether a statute constitutes a taking of property without due process of law or an impairment of the obligation of a contract consists in balancing the burden placed on the individual or corporation on the one hand against the benefit which will accrue to the public



Honorable Dianne Feinstein 3

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as a whole on the other. If the benefit to the public outweighs the burden on the individual, the statute is a valid exercise of the 'police power.'"

A valid exercise of the police power must also be based upon adequate factual grounds and be for the purpose of obtaining a legitimate end by the utilization of reasonable and appropriate measures. As was stated in State Bonded Audit Bureau, Inc. v. Pomona Mutual Building and Loan Association (1940) 37 C.A.2d (Supp.) 765 at page 769:

"If it [the legislation] was based on substantial and extraordinary facts and was, with respect to those facts, reasonably calculated and necessary to protect the public welfare, it is not unconstitutional merely because it alters that which was a definite obligation of the contract in the absence of such extraordinary facts."

See also Laurel Hill Cemetery Co. v. City of San Francisco (1907) 152 C. 464, 471.

Based upon the foregoing, it is apparent that through the valid exercise of the police power a municipality may adopt legislation which has the effect of altering existing contractual obligations. That legislation, however, must be to effectuate the public welfare or a "legitimate end" and the measures utilized must be reasonable and appropriate to obtain the desired result.

The cablevision situation in the City and County of San Francisco is at best, unsettled. As of this date, there are in existence two nonexclusive franchises, one of which has never supplied cablevision service to the residents of the City and County and is presently seeking to surrender said franchise to the grantor. The other has been in operation since 1964 and has provided cablevision service to only a portion of the residents of the City. In fairness to the latter franchisee, it should be pointed out, as referred to above, that the franchisee in question did not have an obligation under the franchise to service any particular area in the City or to complete any certain amount of construction.





Honorable Dianne Feinstein 4

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The City and County is thus in a position of having granted a franchise pursuant to which the franchisee is free to build when, where and if it so desires. Due to the surrender of the other franchise, the result is that the City is entirely dependent on the former for cablevision service. There has not been, as yet, any firm indication by the Board of Supervisors that a new franchise or franchises will be awarded or that the remaining franchisee will become "exclusive."

The Federal Communications Commission has adopted a comprehensive set of Rules and Regulations governing the operations of cablevision systems. These Rules became operative on March 31, 1972, but cablevision systems in actual operation before that date were "grandfathered" into the Rules and were given until March 31, 1977, for full compliance. TSC meets the criteria for those cablevision systems which need not meet FCC requirements until March 1977.

Even if the FCC Rules and Regulations were presently applicable to TSC the issue under discussion is not one which would be directly effected by said Rules.

With regard to franchise areas the FCC stated in its Order of February 2, 1972, Fed. Reg., Vol. 37, No. 30, paragraph 180, on page 3276 as follows:

"180. Franchise area. Another matter uniquely within the competence of local authorities is the delineation of franchise areas. We emphasize that provision must be made for cable service to develop equitably and reasonably in all parts of the community. A plan that would bring cable only to the more affluent parts of a city, ignoring the poorer areas, simply could not stand. No broadcast signals would be authorized under such circumstances. While it is obvious that a franchisee cannot build everywhere at once within a designated franchise area, provision must be made that he develop service reasonably and equitably. There are a variety of ways to divide up communities; the matter is one for local judgment."





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The draft ordinances attached would, in my opinion, be a valid exercise of the police power under the above referred to set of facts. The ordinance provides in brief that the franchisee must submit construction plans and completion dates for those construction plans to the Board of Supervisors for approval. The Board of Supervisors, after hearings, is to determine whether or not said plans will reasonably and equitably provide cablevision service to the residents of the City and County of San Francisco; if the Board determines that the plans will not reasonably and equitably provide such service, no approval will be issued and no new construction of cablevision facilities will be permitted.

The purpose of the ordinance is obvious; to insure that all residents of the City and County of San Francisco have an opportunity to receive cablevision service regardless of the geographic area in which they happen to reside. This quite properly should be designated as providing for the "public welfare" and most certainly is a "legitimate end."

In my opinion, substantial facts do exist which justify the passage of such an ordinance and those measures thereby taken appear to be reasonable and appropriate for the purpose of attaining the end of determining that cablevision service be equitable and reasonably available to all the residents of the City and County of San Francisco. The additional "burden" to be placed upon the franchisee by having to submit construction plans and completion dates therefor does not outweigh the possible benefit to the public which may be derived therefrom.

Additionally, before the ultimate "hardship" may be imposed upon the franchisee (no new construction to be permitted) hearings must be held to determine if facts exist indicating that the proposed construction plans and completion dates will or will not reasonably and equitably, under the circumstances, provide cablevision service to all the residents of the City and County of San Francisco. This also must be construed as a "reasonable and appropriate" measure to accomplish a legitimate end.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



June 6, 1973

Dr. Steven P. Morena  
Superintendent of Schools  
San Francisco Unified School District  
135 Van Ness Avenue  
San Francisco, California 94102

Attention: Dr. Milton F. Reiterman

Subject: Revenue Sharing Funds - Mission Rebels

Dear Dr. Morena:

You have requested my opinion on three questions relating to the disposition of Federal Revenue Sharing Funds which have been proposed for the purchase of kitchen equipment for use in a breakfast program for school children.

"(1) Is it required, in the purchase of equipment thru joint revenue sharing and school district funds, that the procedures and the offices of the Purchasing Department of City and County of San Francisco be method of purchase?"

Under the terms of the State and Local Assistance Act of 1972, 86 Stat. 919, the City and County of San Francisco, not the school district, is the recipient of revenue sharing Funds (Section 108(d)(1)). Section 7.100 of the Charter of the City and County of San Francisco requires that the purchase of kitchen equipment contemplated, made with City funds, be made by the City purchaser. As to that portion of the equipment purchased with funds of the Unified School District, Section 16501 et seq. of the Education Code allows the Superintendent to make such purchases himself or to arrange such purchases through the county purchasing agent. Historically, the San Francisco Purchaser has done most of the purchasing for the school district.

"(2) After the purchase of this equipment, will the ownership of the equipment reside with the San Francisco Unified School District?"



Dr. Steven P. Morena

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Title to that equipment purchased with City funds will reside in the City and County of San Francisco. Title to that equipment purchased with school district funds will reside in the San Francisco Unified School District.

"(3) Would it be legal to lease such equipment to the Mission Rebels for either services rendered or for a fee contract?"

I have been advised that the contemplated equipment is to be installed in various school cafeterias. Lease of the equipment is unnecessary and unless strict control of the use of the equipment were retained by the San Francisco Unified School District, a lease might well be invalid. (See CCSF v. Ross (1955) 4 C.2d 52.) There would be no legal hindrance if the school district retained possession of the equipment and accepted a donation of labor and supplies from the Mission Rebels. (See Education Code §11905.)

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





June 6, 1973

Mr. James F. Wurm  
Assistant General Manager, Personnel  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Court Reporters; Right to Payment  
of Accumulated Sick Leave

Dear Mr. Wurm:

This is in response to your request for my opinion whether Edwin J. Clisham and Alexis J. Batmale who retired as official court reporters in the San Francisco court system on April 1, 1972, and July 1, 1972, respectively, are entitled to receive payment for unused sick leave pursuant to Section 8.1, Rule 32 of the Civil Service Rules (now §23.14.1). The subject court reporters were both employed by the City and County prior to being appointed as official court reporters in the Municipal Court and both were granted indefinite leaves of absence from their civil service positions to accept appointments as court reporters. The subject reporters had no break in service between their civil service and noncivil service positions.

Section 8.1 of Rule 32 of the Civil Service Rules became effective May 26, 1971. It generally provides that sick leave remaining to the credit of an employee upon the effective date of his retirement for service or disability or upon the date of his death or upon the date of separation caused by industrial accident shall be paid to the employee or to his estate. The compensation for unused sick leave credits is to be based on the rate of pay of the regular permanent classification of the employee. This provision is intended as "reimbursement for accumulated sick leave to the credit of the employee and to which he would have been entitled if he had not retired, separated or died."



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Mr. Clisham was appointed as a D60 Jailer (now 8304 Deputy Sheriff) on February 1, 1938. He was promoted to D2 Bailiff (now 8306 Senior Deputy Sheriff) on April 1, 1948. On February 1, 1956, the Civil Service Commission granted Mr. Clisham an indefinite leave of absence from the civil service position to accept appointment as an official court reporter in Municipal Court. He continued in that capacity until January 3, 1961, when he was appointed as an official court reporter in the Superior Court. He remained in the Superior Court as a court reporter until his retirement on April 1, 1972.

Mr. Batmale entered City and County service on March 23, 1939, as a B222 General Clerk in the Municipal Court. On March 3, 1943, he was promoted to a B152a Courtroom Clerk, Municipal Court. On September 2, 1952, Mr. Batmale was granted an indefinite leave of absence from his civil service position to accept an appointment as an official court reporter in the Municipal Court. His entire service as a court reporter was in the Municipal Court and he retired from that position on July 1, 1972.

The subject court reporters were granted indefinite leaves of absence from their civil service positions under Section 153 of the Charter which at that time provided in part:

" . . . no limit shall be placed on a leave of absence granted to enable an officer or employee to accept promotion to a non-civil service position in the same department in which he holds civil service status, or promotion to co-related work in another department or office of the city and county."

Court reporters occupy noncivil service positions. They are appointed by the respective judges of the Municipal and Superior Courts and serve at the pleasure of those judges. (§72194, Gov. Code [Municipal Court]; §69941, Gov. Code [Superior Court].) Court reporters in the Municipal Court are attaches of that court (§74511, Gov. Code) and as such are entitled to the benefits of the civil service provisions of the Charter (§74508, Gov. Code; §72002.1, Gov. Code; see also attached copy of City Attorney Opinion dated April 1, 1971). Section 74508 provides:

"All attaches appointed to positions in the court are entitled to the benefits of the civil service



Mr. James F. Wurm

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provisions of the charter of the City and County of San Francisco, and are entitled to and are subject to any retirement and health service provisions in the charter."

There is no similar provision granting benefits of the civil service provisions of the Charter to court reporters in the Superior Court.

Mr. Clisham and Mr. Batmale accumulated sick leave credits as civil service employees prior to being appointed court reporters. On their appointment as court reporters in the Municipal Court, they continued to accumulate sick leave for the duration of their service in that court pursuant to Section 74508 of the Government Code.

Mr. Batmale's entire service as a court reporter was in the Municipal Court, whereas Mr. Clisham remained in that court until January 3, 1961, when he was appointed as a reporter in the Superior Court. Therefore, Mr. Batmale accumulated sick leave as a civil service employee and as an attache of the Municipal Court from March 23, 1939, until his retirement on July 1, 1972. Mr. Clisham accumulated sick leave credits as both a City employee and Municipal Court attache from February 1, 1938, to January 3, 1961. These accumulations of sick leave were in accordance with Rule 32 of the Civil Service Rules and Section 74508 of the Government Code.

Mr. Batmale is entitled to payment of accumulated sick leave in accordance with Section 8.1 of Rule 32 which is directly applicable to him as an attache of the Municipal Court under Section 74508 of the Government Code. The fact that he was granted an indefinite leave of absence from his civil service position has no bearing on his entitlement to accumulated sick leave. Mr. Batmale should receive compensation for unused sick leave credits at the rate of pay received by him as of his retirement on July 1, 1972.

Mr. Clisham was granted an indefinite leave of absence from his civil service position to accept appointment as a court reporter in the Municipal Court. A person on leave of absence does not cease to be an employee by virtue of taking such leave. (Ballf v. Public Welfare Department, 151 Cal.App.2d 784; City Attorney Letter Opinion No. 63-16 dated August 15, 1963.) As an employee on leave of absence, Mr. Clisham's





Mr. James F. Wurm

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earlier accumulated sick leave benefits continued to his credit for the duration of that leave. (See attached copy of City Attorney Opinion dated April 20, 1972, re Mr. John J. Goodwin.) Mr. Clisham's leave of absence and his employment relationship with the City and County was automatically terminated on the date of his retirement. (See §8, Rule 32 [now §23.14], Civil Service Rules.) Section 8.1 of Rule 32 provides for payment of sick leave "remaining to the credit of an employee upon the effective date of his retirement." Under the provisions of that section, it is my opinion that Mr. Clisham is entitled to payment of sick leave credits accumulated as a civil service employee prior to being granted an indefinite leave of absence and also any sick leave accumulated as a court reporter in the Municipal Court.

The rate to be paid for accumulated sick leave is that rate applicable upon the date of retirement even though such sick leave benefits may have been accrued while the employee was occupying a lower paying position. (See City Attorney Opinion dated April 20, 1972, re Mr. John J. Goodwin.) Therefore, the compensation for Mr. Clisham's accrued sick leave should be based on the salary being paid a court reporter in Municipal Court on the date of Mr. Clisham's retirement on April 1, 1972, because he occupied that regular permanent classification when he last accrued sick leave.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





June 7, 1973

Mr. Bernard F. Schussel  
Director, Office of the Aging  
San Francisco Commission on Aging  
Room 164, City Hall  
San Francisco, California 94102

Subject: Interpretation of Administrative Code  
re Members of Commission on Aging

Dear Mr. Schussel:

This is in reply to your letter of May 15, 1973 as to the age requirement for members of the Commission on the Aging appointed directly by the Mayor and the expiration date for the Office of the Chairman of said commission.

Section 5.50 of Chapter 5, Article V of the San Francisco Administrative Code provides in part:

"There is hereby established a commission to be known as the Commission on the Aging (hereinafter called 'Commission') consisting of twenty-one (21) members, eleven (11) of whom shall be appointed by the Mayor upon the recommendation of the Board of Supervisors, and four (4) of whom shall be appointed directly by the Mayor."

There thus are created two classifications of appointed members, namely, those appointed by the Mayor upon the recommendation of the Board of Supervisors and those appointed directly by the Mayor.

Section 5.50 further provides:

"Members appointed by the Mayor upon the recommendation of the Board of Supervisors shall be representatives of active senior citizen organizations in the City and County, shall be 55 years of age or older, and shall reflect the racial and ethnic population of the City and County."



Mr. Bernard F. Schussel

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June 7, 1973

This portion of the section clearly establishes the standards required of the members appointed by the Mayor upon the recommendation of the Board of Supervisors. No mention is made of those members appointed by the Mayor directly.

The absence of the specified age standard for those members appointed directly by the Mayor, combined with the stated age requirement for other appointed members, indicates that those members appointed directly by the Mayor need not be 55 years of age or older.

In regard to your second inquiry on the term of the Chairman of the Commission, Section 5.50 further provides:

"The Commission shall elect a chairman from among its appointed members. The term of office as chairman shall be for the calendar year or for that portion thereof remaining after each such chairman is elected."

The section clearly states the term shall be for "the calendar year."

The Courts have determined a "calendar year" to be the period from January 1 to December 31 next, both inclusive. (Clopton v. Scharrenberg, 106 C.A.2d 430.) Therefore, the term of office of the Chairman expires on December 31st of each calendar year and the term of the incumbent chairman expires on December 31, 1973.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



June 8, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Power of Board of Supervisors to  
Enact Election Campaign Contribution  
and Expenditure Control Ordinance

Dear Mr. Dolan:

You have asked for my opinion upon the request of Supervisor Francois whether the Board of Supervisors has the power to enact a proposed San Francisco Municipal Election Campaign Contribution and Expenditure Control Ordinance.

Your inquiry is prompted by Letter Opinion No. 71-40 of May 25, 1971 wherein, in response to requests of Supervisors Pelosi and Barbagelata to prepare legislation limiting the amount a candidate for City and County office may spend in radio and television advertising of his candidacy, I advised that in my opinion the proposed legislation would be in conflict with State law and would be beyond the power of the City to enact.

In Letter Opinion No. 71-40, I stated as follows:

"The matter of the expenditure of money in the aid of candidacies in political campaigns has been regulated by the State of California since 1893 when the first 'Purity of Election Law' was enacted, modeled on the 'English Corrupt and Illegal Practices Act' of 1883 (see Chapter I, Division VIII, §§11500 to 11620, Elections Code of the State of California.) This law applies to candidates for municipal office in chartered cities (§11501, Elections Code.)





Mr. Robert J. Dolan

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"In Opinion No. 60-51 issued June 16, 1960, the Attorney General ruled that this particular aspect of a municipal election was a matter of statewide concern and not a municipal affair, and that candidates in a municipal election, and their committees, were required to comply with the provisions of the law. I concur in the opinion of the Attorney General. Accordingly, under the provisions of Article XI, Section 7, of the California Constitution, the city could only enact those ordinances and regulations pertaining to the subject as would not be in conflict with the general law.

"The state 'Purity of Election Law' as originally enacted contained a list of lawful expenses that could be incurred on behalf of a candidate and the maximum amounts which might be expended therefor in a campaign. The limitation as to a maximum amount was removed in 1949 but Section 11504 still contains a listing of the purposes which constitute lawful expenditures in a campaign, and any expenditure by a candidate or his committees for other than lawful expenses constitutes a misdemeanor (§§11504, 11590 and 12053, Elections Code). One of the purposes specified in Section 11504 which constitutes, lawful expense is 'radio and television advertising and speech time.' There is no limitation in the state law on the amount which can be expended for this purpose. The legislation requested by you which would provide for such a limitation would, therefore, be in conflict with the state law and would be beyond the power of the city to enact. (See Warden v. Brown (1960) 8 Cal.Rptr. 518; 185 Cal.App.2d 626.)

On February 14, 1973 Supervisor Gonzales introduced a Charter amendment which limited the amounts of money which could be spent on supervisorial campaigns, prescribed certain limitations on outdoor advertising, and limited funds spent on radio and television time, and prescribed procedures for accounting of funds spent in supervisorial campaigns. On March 3, 1972 I again advised you that in my opinion the proposed Charter amendment would be in conflict with Sections 11500--11631 of the Election Code and Sections 3750-3754 of the Government Code of the State of California.



Mr. Robert J. Dolan

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There are various bills pending in the 1973 Legislature to revise and amend these sections, but there has been no legislation enacted to date. There have been no recent appellate court decisions which refer to State preemption in the field of campaign expenditures and reporting. (Brown v. Superior Court, 5 Cal.3d 509, 1971 construes provisions of the State law relating to campaign expenditures on State propositions, but does not consider the question of State preemption in the field.)

The bills introduced in the 1973 State Legislature include the following Senate Bills:

SB 75 (Nejedly) introduced January 16, 1973. Limits campaign expenditures by candidates for any office, and their campaign committees, to amounts equal to twenty cents (20¢) per registered voter eligible to vote for all candidates for that office in preceding election.

SB 312 (Biddle) introduced February 26, 1973. Enacts a campaign reporting law applicable to all candidates for office in this state and to all committees, as defined, supporting candidates or supporting or opposing ballot measures, requires the filing before and after each election and according to a special schedule of campaign statements which include specified information concerning contributions received, expenditures made, and sources of those contributions and expenditures.

SB 353 (Deukmejian) introduced March 1, 1973. Limits campaign expenditures of candidates for election to any State, County or local office, to amount equal to twenty-five cents (25¢) per registered voter in the area in which the election for the particular office is to be held, or statewide in the case of an office elected statewide.

SB 366 (Gregorio, et al.) introduced March 5, 1973. Enacts California Campaign Disclosure Law, revising the law relating to campaign reporting for candidates and measures, and making such law applicable to all candidates for office at any election.

SB 509 (Alquist, Behr and Moscone) introduced March 21, 1973; amended May 10, 1973. Enacts campaign receipts and expenditures reporting law, and revises generally the campaign reporting requirements relating to all elected officers and candidates "at all levels of State and local government."



Mr. Robert J. Dolan

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The May 10 amendment provides as follows: "Nothing in this chapter shall be interpreted to prohibit local governmental bodies, including special districts, from requiring more detailed or complete disclosure of campaign contributions and expenditures."

The following bills have been introduced in the State Assembly:

AB 316 (Deddeh, et al.) introduced February 12, 1973. Enacts provisions relating to campaign reporting for candidates for State and local office.

AB 589 (Sieroti, et al.) introduced March 5, 1973; amended May 29, 1973. Enacts California Campaign Disclosure Law, revising the law relating to campaign reporting for candidates and measures at any election in the State.

AB 703 (Waxman) introduced March 13, 1973. Enacts Campaign Receipt and Expenditures Reporting Law, requiring statement of receipts and expenditures for and against ballot measures. Applies to candidates for election to State, County, chartered or general law city.

On April 10, 1973 the City of San Diego adopted an election campaign contribution and expenditure control ordinance. This ordinance contains provisions identical in most respects to the proposed ordinance presently being considered. I have been advised that to date there has been no court challenge to any of the provisions of the San Diego ordinance.

I am personally in accord with and endorse the objectives of the proposed ordinance. However, I must again advise you that in my opinion, as a legal matter, the subject matter of the proposed ordinance has been preempted by the provisions of State law, and the City and County of San Francisco does not have the power either to add to the reporting requirements set forth in the State law, or to set limitations upon the amount of campaign expenditures to be made by local candidates. My conclusions appear to be compelled for the reason that the State legislation covers the field, and, as indicated above, the subject matter in question is of statewide concern and not a municipal affair.





Mr. Robert J. Dolan

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I recommend that the Board of Supervisors adopt a City policy in support of a State bill which will accomplish the objectives of the proposed ordinances, either by direct amendment to such bill or by amendment (for example, see SB 509 above cited) which would empower local entities to provide by ordinance for even more stringent provisions.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





June 13, 1973

Mr. Joseph J. Botka  
Chief Probation Officer  
Youth Guidance Center  
375 Woodside Avenue  
San Francisco, California 94127

Subject: Applicability to Juvenile Probation  
Officers of Penal Code Provisions  
Requiring Peace Officers to Receive  
Training in Exercise of Powers of  
Arrest

Dear Mr. Botka:

This is in response to your May 18, 1973, letter adverting to the requirement of Section 832 of the Penal Code that certain Peace Officers undergo a course of training in the exercise of their powers to arrest and in the carrying and use of firearms, and setting forth the following four questions with relation thereto which are hereinafter answered in the numerical order set forth:

1. Must Juvenile Probation Officers in San Francisco undergo this course in light of the Penal Code change to completely fulfill job requirements?
2. Do I have the right as appointing officer and administrator at the Juvenile Probation Department to require each of our staff to undergo this training?
3. If this course of instruction is not completed by each of our Probation Officers, would they lose their status as Peace Officers?



Mr. Joseph J. Botka

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4. Would failure to take this course curtail the function or the employment of any Probation Officer of the Juvenile Court?

1. The answer to this question is "No." Section 832 of the Penal Code prescribes the course of training for "Every person described in this chapter as a peace officer, . . ." The chapter referred to is Chapter 4.5 of Part 2, Title III, Sections 830-832 of the Penal Code. Juvenile Probation Officers are not described as Peace Officers in said chapter and do not receive their powers as Peace Officers from its provisions. Such officers are constituted as Peace Officers under the provisions of Section 584 of the Juvenile Court Law, Sections 500 et seq. of the Welfare and Institutions Code, and they receive their powers as such under that law.

Section 830.5 of the Penal Code, enacted in 1968, provides that "Any . . . probation officer, or deputy probation officer is a peace officer." This designation refers to Adult Probation Officers and not to Juvenile Probation Officers as Adult Probation Officers prior to the enactment of this section did not possess the status of Peace Officers whereas Juvenile Probation Officers possessed that status since the initial enactment of the Juvenile Court Law in 1909. Further, the exercise of the authority of Probation Officers as Peace Officers under Section 830.5 is basically limited under that section to "conditions of parole or of probation by any person in this state on parole or probation; to the escape of any inmate or ward from a state institution; and to the transportation of such persons." This limited Peace Officer authority is consonant with the functions and responsibilities of Adult Probation Officers under State law but it is not consonant with the functions and responsibilities of Juvenile Probation Officers as set forth in the Juvenile Court Law. Accordingly, neither the provisions of Section 830.5 or of Section 832 of the Penal Code have any application to Juvenile Probation Officers.

2. The answer to this question is "No" for the same reasons as set forth in my Opinion No. 73-44, dated April 25, 1973, issued in response to a similar question from Warren T. Jenkins, Chief Adult Probation Officer. A



Mr. Joseph J. Botka

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copy of that opinion is attached.

3 and 4. It follows from the answers given to 1 and 2 above that the answer to each of these questions is "No."

You are thus advised.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





June 14, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Applicability of Conflict of Interest  
Provisions of Charter Section 8.105  
to Votes by Board of Permit Appeals  
Member on Building Permit Appeals

Dear Mr. Dolan:

This is in response to your May 30, 1973, letter attaching a copy of an article from the "Bay Guardian" and requesting, on behalf of Supervisor Kopp, my opinion as to whether the conduct referred to in the article falls within the present proscriptions of Charter Section 8.105. If it does not, you ask for the draft of a Charter amendment which will include such conduct as constituting a violation of the conflict of interest section of the Charter.

The conduct described basically consists of a member of the Board of Permit Appeals voting on an appeal from the denial of a building permit application filed by an owner who has business transactions with the firm by which the Board of Permit Appeals member is employed.

Section 8.105 sets forth the Charter-enacted conflict of interest laws of the City and County. Subdivision (d) of this section provides that violation of any of its provisions shall constitute official misconduct or cause for dismissal and shall subject the violator to the proceedings and penalties provided therefor in the Charter.



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The initial prohibition of subdivision (a) of Section 8.105 is that "No member of any board or commission shall accept any employment relating to the business or the affairs of any person, firm or corporation which are subject to regulation by the board or commission of which he is a member." The Board of Permit Appeals is a quasi judicial body created by Charter to hear and adjudicate appeals from the granting, denial or revocation of permits based on standards promulgated under laws and regulations enacted by the legislative body, the Board of Supervisors, and in some cases by the State Legislature. The Board of Permit Appeals is not itself a regulatory body and the firm by which the Board member is employed is not subject to regulation by the Board within the meaning of this provision. (See City Attorney Opinion No. 1456, dated June 30, 1960 with relation to Board of Examiners.) Accordingly, this provision of Section 8.105 has no application in the present case.

The next succeeding prohibitions of subdivision (a) read as follows: "No supervisor and no officer or employee of the city and county, shall be or become, directly or indirectly, interested in, or in the performance of, any contract work, or business, or in the sale of any article, the expense, price or consideration of which is payable from the treasury; or in the purchase or lease of any real estate or other property belonging to, or taken by, the city and county, or which shall be sold for taxes and assessments, or by virtue of legal process at the suit of the city and county; nor shall any person in this section designated during the time for which he was elected or appointed, acquire an interest in any contract with, or work done for, the city and county, or any department or officer thereof, or in any franchise, right or privilege granted by the city and county, unless the same shall be devolved upon him by law; . . . "

Here, no contract or franchise with the City or real or other property of the City is involved. The prohibition against acquiring an interest in any right or privilege granted by the City in the context in which used refers to special rights and privileges granted in the nature of rights in City property, franchises and other special contractual



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rights and privileges and does not extend to the granting of building permits. This is clearly indicated in the language of the Charter of 1899 from which the above quoted language was adapted. (See § 6 of art. XVI, Charter of 1899.) Further, under basic principles of statutory interpretation, statutes are required to receive a construction that will avoid absurdities and a constitutional rather than an unconstitutional interpretation wherever possible from the language employed. The subject language is prohibitory in nature and to interpret it so as to embrace such general matters as building permits would involve the absurdity that no incumbent officer or employee of the City could secure a permit to construct a home or to repair or rehabilitate property he owns which would be an unconstitutional invasion of the officer's or employee's constitutional right to acquire, possess and protect property. (See §1, art. I, Cal. Const.; Ball v. City Council, 252 C.A.2d 136; City of Carmel-By-The-Sea v. Young, 2 Cal.3d 259.)

The balance of the provisions of subdivision (a) relate to giving or promising of a consideration for election or appointment to a City and County office or employment and the acceptance of gratuities by superiors from subordinates. These provisions are obviously not applicable to the situation here and the same is true of the provisions of subdivision (c) which relate to powers vested in the Civil Service, Police and Fire Commissions and the provisions of (e) to (i), inclusive, all of which relate to contractual relationships with the City.

Subdivision (b) of Section 8.105 reads as follows: "No supervisor and no officer or employee of the city and county shall engage in any activity, employment or business or professional work or enterprise which is inconsistent, incompatible, or in conflict with his duties as a supervisor or officer or employee of the city and county or with the duties, functions and responsibilities of his appointing power, or the department, office or agency by which he is employed, or the board or commission of which he is a member."

With reference to the instant facts, the holding of an employment with a Savings and Loan Association by a member of the Board of Permit Appeals is not the engaging in of an





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incompatible employment or activity within the meaning of this section. The essential purpose of this conflict of interest provision so far as a Board member is concerned is to prohibit a particular employment or the engaging in of an enterprise where the activity engaged in is subject to approval or review or depends for its fruition on the vote of the Board of which the officer is a member. (See City Attorney Opinions No. 1050, dated February 9, 1956; 63-20, dated September 17, 1963.) However, while there is no per se incompatibility between the office held and the particular employment by a Board member, as in an infinite variety of other employments, businesses or professions that could be engaged in by Board members, particular situations may arise in the course of the Board's work where a conflict of interest problem is presented by reason of such employment, business or profession. Such situations are not governed by the conflict of interest provisions of the Charter but are rather governed by the well established common law principle that no one can vote on a question in which he has a direct personal or pecuniary interest. (See City Attorney Opinion No. 747, dated November 16, 1953 for a complete discussion of this common law principle.) The personal interest contemplated by the common law generally relates to the Board member's own personal involvement in the vote such as on votes on questions involving his own character or conduct or his rights as a member, and that is not involved here. Insofar as a pecuniary or financial interest is concerned, the material submitted to me indicates that the Board member did not personally profit financially by any of the votes described in said material. Also, the mere fact that the appellant before the Board had business transactions with the firm by which the member was employed would not necessarily constitute a financial interest by the Board member in the vote within the common law rule. However, if in any of the appeals the firm by which the member was employed received, or could receive, a direct financial benefit by reason of the nature of the vote cast in connection with the particular property, in my opinion, the member would be disqualified from voting in such case by reason of the common law principle. (See McQuillin, Mun. Corp. Vol. 4, Revised Ed. p. 529.) However, such disqualification presupposes knowledge on the part of the member that such financial benefit may ensue by reason of his vote in such case and here,





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according to the information furnished me, the member had no such knowledge. The common law principle is designed to ensure an unbiased and impartial vote by the Board member free from any influence other than the merits of the particular case and obviously if the member has no knowledge that his vote would or could result in financial gain or benefit to himself or to his employer, there has been no violation of the common law principle and no violation of official duties.

You are accordingly advised that the conduct described in the material submitted with your letter is not covered by the conflict of interest provisions of Section 8.105 of the Charter but that it is governed by the common law as above discussed. However, it is to be noted that there is some uncertainty about the present application of the common law principle in the City and County created by a fairly recent enactment of the State Legislature. Under the provisions of Section 22.2 of the Civil Code, the common law so far as it is not repugnant to, or inconsistent with, the Constitution of the United States or the Constitution of laws of this State is the rule of decision in all the courts of this State. In 1967 the Legislature adopted Article 4.6, Sections 1120 and 1121 of the Government Code relating to noncontractual financial interests. Section 1120 reads as follows:

"§ 1120. Disclosure of direct financial interest by board or commission members: What constitutes direct personal financial interest.

"(a) [1] Members of governing bodies, boards and commissions of any local public agency shall disclose any direct personal financial interest [2] in any noncontractual [1] matter coming before such governing body, board or commission. Any member of a governing body, board or commission of any local public agency who knowingly fails to disclose such interest shall be guilty of misconduct in office and shall be punishable as provided in Article 3 (commencing with Section 3060) of Chapter 7, Division 4, Title 1.



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"(b) A member of the governing body, board or commission shall not be deemed to have a direct personal financial interest in a noncontractual matter if his interest is:

"(1) The ownership of less than 3 percent of the shares of a corporation for profit, provided the total annual income to him from dividends, including the value of stock dividends, from the corporation does not exceed 5 percent of his total annual income, and any other payments made to him by the corporation do not exceed 5 percent of his total annual income;

"(2) That of an officer in being reimbursed for his actual and necessary expenses incurred in the performance of official duty;

"(3) That of a recipient of public services generally provided by the local public agency for which he acts, on the same terms and conditions as if he were not a member of the governing body, board or commission."

The question is whether this statute which modifies the common law rule, at least for those local public agencies in which the statute is operative, applies to a chartered city or city and county in the absence of a local charter provision on the same subject. The term "local public agency" or "local agency" generally includes chartered cities and a city and county but this has been specifically indicated in the statute through definition of the term "local public agency" or "local agency." Thus, for example, in the following article of the Code, Article 4.7 relating to incompatible activities, "local agency" is defined to include "county, city, city and county,...." Also, Section 54951 of the Ralph M. Brown Anti-secrecy Act defines "local agency" to include "a county, city, whether general law or chartered, city and county,...." There is no such definition in Article 4.6 of the Government Code.

The uncertainty can, of course, be eliminated by the adoption of a Charter amendment on the same subject which it is



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competent for the City and County to do as conflicts of interest have traditionally been considered to be, and have been legislated on locally by Charter, as matters of municipal concern but the preparation of such an amendment involves some policy considerations. Under the common law if the inhibited interest is present, the officer is disqualified from voting. Under the statute when such an interest is present, the officer is merely required to disclose his interest but there is no prohibition against his voting on the matter before the Board of which he is a member. Also, the common law prohibits voting on a question in which the officer has a direct personal or pecuniary interest. The statute relates only to a "direct personal financial interest" and specifies certain exceptions. With particular reference to the Board of Permit Appeals, it should also be considered that the Charter requires a vote of four of the five members to overrule the department initially acting on the permit, and an appellant has a right to a vote by at least four qualified members of the Board. There are time limits on the rendition of the Board's decision and it could happen that on the day on which it must act there would only be four members present and, if one of them was disqualified, a decision could not be rendered. In such cases, the common law permits an exception to disqualification from voting on a matter in which a person has a personal or pecuniary interest, which has been referred to as the "rule of necessity" and the officer could nonetheless vote despite his disqualifying interest. (See Gonsalves v. City of Dairy Valley, 265 Cal.App.2d 400.) This rule has been incorporated into the provisions of subdivision (f) of Section 8.105 relating to contractual interests. A Charter amendment adopted by the City and County could, of course, adopt the modified version of the common law as set forth in Article 4.6 of the Government Code, or it could adhere to the more restrictive common law provisions, or it could be a combination of both, or it could contain whatever other legal provisions are desired by the Supervisors.

If, after consideration of the matters set forth in this letter you wish to request a Charter amendment specifically stating in your request the nature of the amendment to be prepared in light of the above considerations, I shall be pleased to prepare the form of amendment desired.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



June 15, 1973

Honorable Dianne Feinstein  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Proposed Amendment of Zoning  
Law re Single Family Residence.  
Your file number 147-73.

Dear Supervisor Feinstein:

Subsequent to receipt of your letter of April 11, 1973, relative to the Planning and Development Committee's consideration of the modification of the definition of the term "family" as it is used in the City Planning Code, we received Mr. Dolan's letter containing questions which were raised at the Committee's hearing of May 15. As both these requests deal with the same subject matter, this office will consider both requests for opinion as one.

The proposed modification of the definition of the term "family" is as follows:

"Family. A single and separate living unit, consisting of either:

"(a) one (1) person, or two (2) or more persons related by blood, marriage or adoption or by legal guardianship pursuant to



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court order; plus necessary domestic servants and not more than three (3) roomers or boarders; or

"(b) a group of not more than five (5) persons unrelated by blood, marriage or adoption or such legal guardianship.

"A group occupying a fraternity house, club building, hotel, motel, or any other building or portion thereof other than a dwelling, shall not be deemed to be a family."

You asked about the constitutionality of the proposed modification of the term "family" in view of the case of Boraas v. Belle Terre which was decided by the Second Circuit of the United States Court of Appeals on February 23, 1973. (An appeal from that decision is presently being sought in the United States Supreme Court.)

Although the Boraas case did hold that one could not determine single-family zoning on the basis of consanguinity, the court indicated that an ordinance which was more permissive than one which limited the number of unrelated occupants to two persons per one-family dwelling would suffice if the purpose of such an ordinance were to maintain population density "at the level of traditional family units." The court took notice that the limit of two unrelated persons per one-family dwelling was smaller than the size of the average family.

The court in Boraas found that the "discriminatory" classification created by the ordinance did not appear to be supported by any rational basis that is consistent with permissible zoning objectives.



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That finding was, as admitted by the court, in direct conflict with the decision of the United States District Court for the Northern District of California in the case of Palo Alto Tenants Union v. Morgan (1970), 321 F.Supp. 908 (currently on appeal to the United States Court of Appeals for the Ninth Circuit). In the Palo Alto case the court sustained the following definition of "family":

"One person living alone, or two or more persons related by blood, marriage, or legal adoption, or a group not exceeding four persons living as a single house-keeping unit." (Palo Alto Municipal Code, §18.04.210.)

In Palo Alto, as the court in the Boraas case pointed out, the United States District Court in California found that the ordinance was rationally related to population density control, traffic control, and maintenance of lower rental rates. The District Court for the Northern District of California also found a "long recognized value in the traditional family relationship which does not attach to the 'voluntary family.'" (321 F.Supp. at p. 911.) The court also found that, given the state's clear interest in preserving the integrity of the traditional family unit, the Palo Alto ordinance's distinction between it and groups of unrelated persons did not discriminate between them except insofar as was necessary to promote clear, and overriding, state interests (Id., at 912).

The court in Boraas did not state the reasons why the District Court there, unlike the California court, found that the Belle Terre ordinance was not rationally related to traditional zoning objectives.





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However, one basis would seem to be the Belle Terre ordinance's limit of a maximum of two unrelated persons to a single-family dwelling as opposed to Palo Alto's four, or the proposed limit of five in the amendment which is the current subject of your deliberations.

The landmark case in the area of municipal zoning is (Village of) Euclid v. Ambler Realty Co., which was decided by the United States Supreme Court in 1926 (272 U.S. 365, 47 S. Ct. 114, 71 L.Ed. 303). There, the Supreme Court held that if the municipality's legislative body deems that any of the reasons presented to it in support of zoning legislation, or any other substantial reason, is sufficient basis for adopting an ordinance, it is not the function of the courts to disagree. The California Supreme Court has adopted the same rationale. (Consolidated Rock Products Co. v. City of Los Angeles (1962), 57 Cal.2d 515.)

Subsequent cases have held that where a municipality exercised its police power in the form of a zoning regulation, that every intendment is in favor of the validity of the exercise of that police power to promote the public health, safety, morals and general welfare (Wilkin v. City of San Bernardino (1946), 29 Cal.2d 332, 175 P.2d 542; Inna v. City of Baldwin Park (1970), 9 Cal.App.3d 909; City of Long Beach v. Lambda, Etc., Fraternity (1967), 255 Cal.App.2d 789, 63 Cal. Rptr. 419), and that a court should interfere with the judgment of local authorities in zoning matters only in the most extreme cases and under the most extreme circumstances. (Confederacion de la Raza Unida v. City of Morgan Hill (1971), 324 F.Supp. 895.)

Further, courts have consistently held that the control of population density in residential neighborhoods is a permissible objective in the overall purpose



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of zoning. (Town of Los Altos Hills v. Adobe Creek Properties, Inc., Ct.App., 1st Dist., 1 Civ. 30116 (decided May 18, 1973); Euclid v. Ambler Realty Co., supra; Planning & Zoning Commission v. Synanon Foundation, Inc. (Conn., 1966), 153 Conn. 305, 216 A.2d 442; Palo Alto Tenants Union v. Morgan, supra; Boraas v. Belle Terre, supra.)

It is also pertinent to note that the proposed amendment would result in a similar definition of "family" in the City Planning Code as is currently found in the Housing Code (§203.6) and the Building Code (§402.6.1).

It is our opinion, therefore, that if the Committee and the Board of Supervisors find that the proposed amendment of the definition of the term "family" bears a rational relationship to such traditional zoning objectives as population density control, traffic control, and the maintenance of lower rental rates, it would not violate constitutional provisions.

\* \* \*

Your second question, in order, was whether the zoning administrator has the authority to interpret the term "family" under the existing ordinance.

The present definition of the term "family" is contained in Section 102.8 of the City Planning Code and reads as follows:

"One (1) or more persons occupying the premises and living therein as a single and separate housekeeping unit. A group occupying a boarding house, fraternity, club, hotel or motel shall not be deemed to be a family as the term is used in defining a dwelling unit."



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The position of zoning administrator is created by Section 7.502 of the Charter which, after establishing the position and providing that such zoning administrator be appointed subject to Civil Service provisions, states that he "shall administer and enforce the zoning and set-back ordinances."

"The term 'administer' is generally defined to mean manage, control and conduct the affairs or business of a governmental agency to which it relates. (See Chistgave v. Fine (Minn.), 27 N.W.2d 193.)

"The word 'enforce' means to cause to be executed or performed; to cause to take effect; to compel obedience to; to put in force. (See Dozier v. City of Gatesville (Tex.), 51 S.W.2d 1091.)" (Opinions of the City Attorney, No. 66-4.)

Section 307(a) of the City Planning Code (Other Powers and Duties of the Zoning Administrator) provides:

"(a) Rules, regulations and interpretations. The Zoning Administrator shall, consistent with the expressed standards, purposes and intent of this Code and pursuant to its objectives, issue and adopt such rules, regulations and interpretations as are in his opinion necessary to administer and enforce the provisions of this Code. Such rules and regulations, and any such interpretations that will be of general application in future cases, shall be made a part of the permanent public records of the Department of City Planning. The Zoning Administrator shall respond to all written requests for determinations regarding the classification of uses and the interpretation and applicability of the provisions of this Code."





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The question thus becomes whether an interpretation of the term "family" is, in the opinion of the Zoning Administrator (and, reasonably,) necessary to administer and enforce the provisions of the City Planning Code. It is the opinion of this office that such an interpretation is necessary for the reason that the present definition of the term "family" is not so clear as to dispense with the need to exercise discretion in the enforcement of single-family zoning provisions.

The definition basically provides that "family" includes a group of people living on the premises as a single and separate housekeeping unit. However, the second sentence limits the definition to exclude groups occupying a boarding house, fraternity, club, hotel, or motel. Further, the uses permitted by the City Planning Code are deemed to include in each case appropriate accessory uses. Therefore, there are two basic types of occupancy of a one-family dwelling to be considered; viz., the occupants constituting the "family," and those deemed accessory to the family.

Exercise of the Zoning Administrator's discretion is therefore required to determine such questions as: whether there is a limit to the number of related persons allowed to occupy a one-family dwelling; whether occupancy of a one-family dwelling is limited to persons related by law or blood and if not, how many unrelated persons may be included; whether foster children, mentally retarded or otherwise disabled persons may be housed in a one-family dwelling; whether roomers or boarders may be taken in and, if so, how many; whether servants or guests may be accommodated. (See Zoning Division's Staff Memorandum dated August 23, 1967, dealing with "Allowable Occupancy of a One-Family Dwelling under the City Planning Code.")



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It is clear, therefore, that an interpretation of the present definition is necessary.

The question whether the legislative body of a municipality may delegate the power to interpret a zoning ordinance is answered in the affirmative. The power of a legislative body to make a law (City Planning Code §307(a)) to delegate a power to determine some fact or state of things to which the law relates was sustained by Wheeler v. Gregg (1949), 90 Cal.App. 2d 348, and by Borum v. Graham (1935), 4 Cal.App.2d 331. The case of Bank of Italy v. Johnson (1926), 200 Cal.1, states that the authority of an administrative board or officer to adopt reasonable rules and regulations which are deemed necessary to the due and efficient exercise of powers expressly granted is implied from the power granted, as long as the rules and regulations do not change, alter, amend or extend the administrative officer's statutory powers. The case of Lockard v. City of Los Angeles (1949), 33 Cal. 2d 453, Cert.den. 337 U.S. 939, stated that findings relating to matters of opinion and judgment lie within the discretion of zoning administrators.

The zoning administrator then has the authority to interpret the term "family" under the existing ordinance.

\* \* \*

Your next question, whether the proposed legislation is discriminatory or unduly restrictive had been answered in the negative above. To further answer the question, however, it is well to point out that the proposed amendment, in limiting the number of unrelated persons allowed to occupy a one-family dwelling to five, follows other existing sections of the City Planning Code.



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The present definition of family, as indicated above, specifically excludes a group occupying a boarding house, etc. "Boarding house" is defined in terms of six or more persons (Planning Code, §102.2). Further, as pointed out above, this maximum limit of five persons is also in accord with the definition of "family" in the Housing Code and the Building Code.

\* \* \*

Your last question was whether the Planning and Development Committee can amend the item before it, or whether it must either approve or disapprove, and then send it back to the City Planning Commission for its amendment.

In answer to this question, Planning Code Section 302(d) is self-explanatory:

"Referral of proposed text amendments back to City Planning Commission. In acting upon any proposed amendment to the text of the Code, the Board of Supervisors may modify said amendment but shall not take final action upon any material modification that has not been approved or disapproved by the City Planning Commission. Should the amendment be so materially modified while it is before said Board, said amendment as so modified shall be referred back to the City Planning Commission for its consideration. In all such cases of referral back, the amendment as so modified shall be heard by the City Planning Commission according to the requirements for a new proposal, except that newspaper notice required under Section 306.3 need be given only ten (10) days prior to the date of the hearing."

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

The first part of the paper is devoted to a review of the literature on the topic of the effect of the size of the sample on the power of the test. It is shown that the power of the test is a function of the size of the sample, the size of the effect, and the level of significance. The power of the test is a function of the size of the sample, the size of the effect, and the level of significance. The power of the test is a function of the size of the sample, the size of the effect, and the level of significance.

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$$P = 1 - \beta = 1 - \alpha - \gamma$$

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June 18, 1973

Mr. Bernard A. Orsi  
General Manager, Personnel  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Veterans Preference for Military  
Service in the Korean Conflict  
and for Award of the National  
Defense Service Medal

Dear Mr. Orsi:

This is in response to your request for my opinion on two issues. First, what are the actual dates of the Korean conflict for purposes of awarding veterans preference under Section 8.324(c) of the Charter and, second, whether the National Defense Service Medal is a campaign or expedition medal within the meaning of Section 8.324(d) of the Charter.

KOREAN CONFLICT

The United States entered the Korean war on June 27, 1950, to assist the United Nations in defending South Korea from communist aggression. The actual hostilities commenced on June 27, 1950, when the North Koreans invaded South Korea and terminated on July 27, 1953, when an armistice agreement was signed between the United Nations command, the Korean People's Army and the Chinese People's Volunteers. However, United States armed forces remained in Korea after that date to maintain the armistice. Even though the actual hostilities ceased on July 28, 1953, the President of the United States set January 31, 1955, as the terminal date for certain veteran's benefits and tax exemptions. (See Presidential Proclamation 3080, 69 Stat. c. 17; Exec. Order 10585.)

At the general election in November 1952 Section 145.01 of the Charter was added to define time of war. Section 8.324(c) [then §145.01(c)] directly covers the Korean conflict. It provides:





Mr. Bernard A. Orsi

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"(c) The period of time during which the United States is or has been assisting the United Nations or any nation or nations in accordance with existing treaty obligations, in active military operations against any foreign power, whether or not war has been formally declared."

It is interesting to note that Section 145.01 was added to the Charter during the Korean war and it is reasonable to assume that it was amended to grant veterans of that conflict credits in civil service examinations.

After Section 145.01(c) of the Charter was enacted, the Civil Service Commission adopted Rule 10, Section 7(c) [now §9.14(g)(2)] designating the period of time of active military operation in Korea from June 27, 1950, to July 27, 1953. (Rule amended January 22, 1954.)

The period June 27, 1950, to July 27, 1953 constituted "active military operations" in Korea even though certain veterans benefits and tax exemptions were extended to January 31, 1955. A state of war does not terminate with cessation of hostilities but as a general rule must be terminated by a treaty, Congressional resolution, Presidential proclamation or some other political act. (Ludecke v. Watkins, 335 U.S. 160 (1948); 45 Georgetown Law Rev. 45.) A technical state of war continued after cessation of hostilities in Korea on July 27, 1953, but in a popular sense the war was terminated with the surrender or capitulation of the enemy. In that sense the termination of hostilities in Korea on July 28, 1953, constituted a termination of the war. (See Kaiser v. Hopkins, 6 Cal. 2d 537; Burger v. Employees' Retirement System, 101 Cal.App.2d 700.)

Section 8.324(c) of the Charter clearly provides that time of war will be the period of "active military operations." Those active military operations ceased in Korea on July 27, 1953. Where a statute or constitutional provision has been adopted by vote of the electors, courts have recognized the probability that the electorate intended words of the statute to be interpreted in their popular, rather than in their technical sense. (Kaiser v. Hopkins, *supra*; Burger v. Employees' Retirement System, *supra*.) In the Kaiser case, a tax exemption authorized in time of war was denied a soldier who enlisted after November 11, 1918, even though a technical state of war existed until July 2, 1921. In like manner, the Burger case held that the phrase "termination of said war" in Section 163 (now §8.511) of the San Francisco Charter meant December 31, 1946, which was the President's official declaration of the cessation of hostilities even though World War II continued in a technical sense after that date. (See Lynch v. City and County of San Francisco, 117 Cal.App.2d 347.)



Mr. Bernard A. Orsi

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It is therefore my opinion that the period June 27, 1950 to July 27, 1953, as specified in Section 9.14(g)(2) of the Civil Service Rules is the period of "active military operations" for the Korean war as that term is used in Section 8.324(c) of the Charter.

NATIONAL DEFENSE SERVICE MEDAL

You have advised me that certain individuals have appealed to the Civil Service Commission claiming that they have earned the National Defense Service Medal for military service during the Korean conflict and thereby request veterans preference under Section 8.324(d) of the Charter which provides:

"(d) The period of time during which the United States is engaged in a campaign or expedition in which a medal has been authorized by the government of the United States; provided, however, that no person shall be eligible for the benefits provided for veterans in this section unless he shall have been eligible to receive such a medal."

The above quoted section defines "time of war" as that period of time when the United States is engaged in a campaign or expedition in which a medal has been authorized by the government of the United States. I have reviewed the "Awards" manual issued by the Department of Army and "Awards Manual" issued by the United States Navy and Marine Corps. In each manual there is designated the National Defense Service Medal for honorable active service between June 27, 1950 and July 27, 1954, or after December 31, 1960. Also, those manuals list the Korean Service Medal which is awarded to members of the Armed Forces of the United States who participated in the operations in the Korean area between the same dates of June 27, 1950, to July 27, 1954.

It appears that the National Defense Service Medal was issued to cover the period of the Korean campaign as it coincides with the same dates for the Korean Service Medal. Both are awarded for service during the Korean conflict of June 27, 1950 to July 27, 1953 and one year thereafter. Even though actual hostilities ceased on July 27, 1953, with the armistice, there was continued occupation of that country by the United States armed forces who were subject to war time risks during the cease fire period. There were, in fact, numerous combatant activities along the border which had been established by the armistice. In this regard the United States continued to grant veteran's benefits and tax exemptions until January 31, 1955. The President of the United States set January 31, 1955, as a terminal date for certain veteran's benefits and tax exemptions.





Mr. Bernard A. Orsi

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(See Presidential Proclamation 3080, 69 Stat. c. 17; Exec. Order 10585.) That date has been recognized as a termination of the Korean hostilities in the interpretation of a California statute. (See Rapp v. Gibson, 51 Cal.2d 457.)

The military services recognize that the Korean campaign extended beyond July 27, 1953, because it issued the Korean Service Medal and the National Defense Service Medal for one year beyond that date, or until July 27, 1954. The National Defense Service Medal was issued as recognition for all members of the armed forces who were on active military duty during the Korean campaign and thereby subject to orders to the military zone. Both the Korean Service Medal and National Defense Service Medal are, in my opinion, campaign medals awarded for service in the Korean war and no distinction should be made between the two medals for the purpose of granting veterans preference.

Section 8.324(d) of the Charter expands the definition of time of war to include the period of time during which a campaign or expedition medal is authorized by the government of the United States. It is my opinion that during the period between June 27, 1950 and July 27, 1954, the United States was engaged in the Korean campaign for which the National Defense Service Medal was authorized by the government of the United States and therefore a person who is awarded that medal for service during that period is entitled to the veterans preference under Section 8.324(d) of the Charter.

In summary, it is my opinion that in accordance with Section 8.324(c) of the Charter the dates for active military operations in Korea are properly established by civil service rules as June 27, 1950 to July 27, 1953, and that the National Defense Service Medal is a campaign medal authorized by the government of the United States during the period time in which the United States was engaged in the Korean conflict within the meaning of Section 8.324(d) of the Charter.

If an individual had been issued the National Defense Service Medal for active military service after December 31, 1960, then his right to a veterans preference under Section 8.324(d) would depend on whether that medal was issued in conjunction with a campaign or expedition.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





June 18, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Proposed Ordinance Regulating Contributions  
to and Expenditures by Candidates for  
Elective Offices of the City and County

Dear Mr. Dolan:

This will acknowledge receipt of original and one copy of the above captioned proposed ordinance for approval as to form pursuant to the provisions of Section 3.401 of the Charter.

Section 3.401 of the Charter provides, in part, that: "The city attorney shall prepare, or approve as to form, all ordinances before they are enacted by the board of supervisors."

The proposed ordinance has not been prepared by this office and, as pointed out in my letter to you dated June 8, 1973, the subject matter of the proposed ordinance has, in my opinion, been preempted by the provisions of State law, and the City and County of San Francisco does not have the power either to add to the reporting requirements set forth in the State law, or to set limitations upon the amount of campaign expenditures to be made by local candidates.

Accordingly, I am returning herewith the original of the proposed ordinance approved as to form only for the limited purpose of allowing the Board of Supervisors to consider enactment of the proposed ordinance in accordance with the provisions of Section 3.401 of the Charter.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



June 22, 1973

Mr. Bernard A. Orsi  
General Manager, Personnel  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Promotion of Harbor Police  
to Q2 Policeman

Dear Mr. Orsi:

This is in response to your request for opinion on the following question:

"Would it be possible for the Civil Service Commission to announce a promotive examination for the class Q2 Policeman designating current permanent employees in the classification of Harbor Police as the next lower rank?"

The Charter enumerates certain ranks in the Police Department and authorizes the Police Commission to create new ranks or positions. (§3.531, Charter.) The Q2 Policeman rank is the entrance position into the uniformed force of the Police Department. Section 8.320(c) of the Charter provides that applicants for the entrance positions in the uniformed force of the Police Department shall meet certain age and physical requirements.

The Charter does not prohibit promotion from a position outside the ranks of the uniformed force to an entrance rank in the Police or Fire Departments. (See City Atty. Op. No. 70-16 dated April 1, 1970.) Therefore, the Civil Service Commission could designate the classification of Harbor Police as the next lower rank for a promotive examination to Q2 Policeman but the candidates taking that examination would have to meet the age and physical requirements provided in Section 8.320(c) of the Charter.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



June 25, 1973

Mr. Tom Spillane  
Business Manager  
Youth Guidance Center  
375 Woodside Avenue  
San Francisco, California 94127

Subject: Application No. 24240, Appropriative  
Water Rights; Mindego Creek

Dear Mr. Spillane:

Referring to your letter of May 22 to Mr. Daniel E. Collins III, Deputy City Attorney, and to our several telephone conferences, I have made an extensive review of the problem of the Mindego Creek water supply.

Before a protest can be filed with the State Water Resources Central Board against an application to appropriate water, it is necessary for the would-be protestant to show possible interference with either (1) an adjudicated water right, (2) a riparian right, (3) a pre-1914 appropriative right, or (4) a permit or license to appropriate water granted by the state board. A protest based solely upon use of water commenced since December 19, 1914, will not be accepted (Tit. 23 Cal. Adm. Code, Sec. 719.5).

I have reviewed files of the Director of Property, interviewed various members of your staff and visited Log Cabin Ranch and the diversion point for water from Mindego Creek. I have also reviewed files of the Department of Water Resources concerning applications to appropriate water from San Gregorio Creek and its tributaries. I can find no record that indicates City is possessed of an adjudicated water right, a pre-1914 appropriative right or a permit or license granted by the state board. The City appears to have a riparian right, but its riparian right to use waters of Mindego Creek will not support any use outside the watershed of Mindego Creek (Hutchins, California Law of Water Rights, p. 202), and all of the usage of water by the ranch is outside the watershed of Mindego Creek.

Since 1963 the State Water Resources Central Board (formerly the State Water Rights Board) has on three occasions





Mr. Tom Spillane

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June 25, 1973

denied applications to appropriate water from San Gregorio Creek and its tributaries during the four critical months of the year (June, July, August and September), on the grounds that no unappropriated water exists in the stream system during those months. The senior water rights holders on the stream are farmers who divert for domestic and irrigation uses under riparian rights and ancient appropriative rights, along the lower reaches of San Gregorio Creek. There have been many years in which they were out of water. These people for the most part have already filed protests to the pending Application of Cuesta La Honda Guild and the application will probably be denied for those four summer months. There is unappropriated water available in the streams in the other eight months.

It is my recommendation, in view of the foregoing, that you continue using Mindego Creek as a water supply. The downstream water rights holders might at some time attempt to stop your diversions during the dry months, at which time you can assert a defense based on prescriptive water rights, inasmuch as your diversions have continued far in excess of five years, and, depending on the evidence presented, during many years when there was no water available downstream to satisfy the irrigation and domestic demand.

Relative to the upstream pumping from Mindego Creek by Cuesta La Honda Guild, care should be taken that that body does not gain a prescriptive right against Log Cabin Ranch. I do not believe this has occurred as yet because in the past there has been some informal accommodation by the Guild to your needs, and enough water has come down to keep the ranch operable. I have in mind a previous arrangement wherein the Guild pumped only in the daytime, so that the ranch could pump during the night. On the slightest exhibition of lack of cooperation by the Guild, however, please consult this office in order that consideration can be given to an injunction proceeding against the Guild.

Law suits do not create any new water, however. From the long term point of view, City and Cuesta La Honda Guild might consider pooling their resources to build storage to capture some of the unappropriated water that flows during the rainy season, for use during the dry season. Cuesta La Honda Guild presently has a permit from the state to divert water to storage in the rainy season and might be receptive to an offer of financial aid in return for part of the water.

The advice contained in this letter, particularly with reference to prescriptive water rights, should be kept confidential, as public knowledge of the dependence on prescription,





Mr. Tom Spillane

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could result in premature legal difficulties.

You are so advised.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



June 26, 1973

Mr. Joseph E. Tinney, Assessor  
101 City Hall  
San Francisco, California 94102

Attention: Mr. George W. Loftus  
Director of Assessment Services

Subject: Vol. 23, Block 3511, Lot 75  
Estate of Herman & Maurice Herbst  
1525-31-35 Mission Street  
San Francisco, California

Dear Mr. Tinney:

This is in response to your letter of October 20, 1972, requesting my opinion as to whether or not the above referenced real property, in whole or in part, is exempt from real property taxes.

Your letter, together with enclosures, indicates that during the period October 1, 1971, through March 31, 1972, a portion (i.e., 45.92% of the square footage) of the building was leased to the San Francisco Unified School District and used exclusively for school purposes under an educational program known as Opportunity High School.

The basic exemption provision governing property used for public schools is contained in Article XIII, Section 1 of the California Constitution, which provides in pertinent part as follows:

" . . . property used exclusively for public schools . . . shall be exempt from taxation . . . "

Moreover, Section 202 of the Revenue and Taxation Code provides in pertinent part as follows:

"The exemption of the following property is as specified in Section 1 of Article XIII of the Constitution:



Mr. Joseph E. Tinney

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". . .

"(c) Property used exclusively for public schools."

The above exemption provisions are based upon use, rather than ownership of the property. Hence, if the property is "used exclusively for public schools," it is entitled to the exemption, notwithstanding that the property is owned by a private individual and merely leased to a school district. (Ross v. City of Long Beach (1944) 24 Cal.2d 258.)

The question remains whether or not the public schools exemption applies where only a portion of the property (e.g. 45.92%) is leased by the school district and used exclusively for public schools. Stated in another way, the question is whether the word "exclusively" was intended to limit the exemption to situations where the entire block and lot, as shown in the assessor's records, is used for school purposes.

No cases have been found with respect to the use of the word "exclusively" as used in Article XIII, Section 1 or in Revenue and Taxation Code Section 202. However, a similar question has arisen under the so-called "welfare exemption," which is provided for in Article XIII, Section 1c of the California Constitution, which reads in pertinent part as follows:

". . . the Legislature may exempt from taxation all or any portion of property used exclusively for religious, hospital or charitable purposes. . ."

In Y.M.C.A. of Los Angeles v. County of Los Angeles, (1950) 35 Cal.2d 760, the Court not only approved, but ordered, an allocation between exempt and nonexempt portions of buildings based upon whether or not use of the particular portion of the building was consistent with the above "welfare exemption."

More specifically, even before trial, the assessor had accorded exemption to portions of certain Y.M.C.A. buildings devoted to gymnasiums, locker rooms and the like. However, the assessor had denied exemption to portions of the building devoted to restaurants, meeting rooms, barber shops, tailor shops, gymnasium stores and an office room rented to a government agency. The assessor had also denied exemption to portions of the buildings devoted to dormitory accommodations.

The appellate court upheld the assessor's denial of the exemptions, except as to the dormitory accommodations, which were held entitled to the welfare exemption. Accordingly, the





Mr. Joseph E. Tinney

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June 26, 1973

case was remanded for further allocation between exempt and non-exempt portions of the building.

In Cedars of Lebanon Hosp. v. County of Los Angeles (1950) 35 Cal.2d 729, the Court ordered a similar allocation between that portion of the hospital building used for a thrift shop, which was held not entitled to the welfare exemption, and the remainder of the building which, the court found, qualified as "property" used exclusively for . . . hospital . . . purposes."

Accordingly, it is my opinion that an allocation is appropriate where only a portion of a building is entitled to the public schools exemption.

Assuming that the facts forwarded to me are both complete and accurate, a portion of the above referenced property was leased to the San Francisco Unified School District and used exclusively for a public school during a portion of the 1971-1972 fiscal year. Based upon these facts, it is my conclusion that the subject property is entitled to a partial exemption from real property taxes for the 1972-1973 fiscal year to the extent a portion of the building (reportedly 45.92%) was used exclusively for school purposes. A further apportionment must be made of course, by reason of the fact that the property was used for school purposes during only fifty percent (50%) (October 1, 1971 - March 31, 1972) of the fiscal year.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



June 28, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Board of Directors of Golden Gate Bridge,  
Highway and Transportation District; Duty  
of San Francisco Representatives Thereof  
to Follow Official City and County Policy

Dear Mr. Dolan:

This is in response to your recent letter wherein you advise that Supervisor John L. Molinari has requested that I review Letter Opinion No. 72-51, dated July 3, 1972. In that opinion I advised that in any situation where a state statute requires a member of your Board of Supervisors be elected to the governing body of a multi-county agency, such as the Golden Gate Bridge, Highway and Transportation District or the Bay Area Air Pollution Control District, such dual membership would not constitute a conflict of interest. I also advised that, with respect to the Board of Directors of said Districts, each director representing the City and County of San Francisco on the Bridge District Board has a duty to vote on any matter coming before said Board in accordance with the officially established policy of the City and County, while no such duty was imposed upon the directors representing the City and County on the Air Pollution Control District Board.

As pointed out in Letter Opinion No. 72-51, my advice with respect to the duties of the San Francisco representatives on the Bridge Board was based upon an analysis of the legislation authorizing the creation of the District. (Streets and Highways Code, Sec. 2700 et seq.) Pursuant to the provisions of this enabling legislation the Golden Gate Bridge and Highway District (now the Golden Gate Bridge, Highway and Transportation District) was created by actions taken by the boards of supervisors and the people of the six counties comprising the District. (Streets and Highways Code, Secs. 27020 - 27113.) The taxpayers of the six counties paid the preliminary expenses of the District, (Streets and Highways Code, Secs. 27169, 27200 - 27206) and all taxable



Mr. Robert J. Dolan

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June 28, 1973

property in the six counties was liable to tax until the entire principal and interest of the bonded indebtedness of the District had been paid in full. (Streets and Highways Code, Secs. 27304 - 27305.) Upon dissolution of the District any surplus funds are to be distributed to the various counties comprising the District. (Streets and Highways Code, Sec. 27165; Golden Gate Bridge, Etc. Dist. v. Luehring, 4 Cal.App.3d 204, 214.) In People ex rel. Bagshaw v. Thompson, 55 Cal.App.2d 147, the court described the status of the directors of the District as follows:

"Generally speaking, the directors are the agents of the county from which they are appointed, and the persons through whom the county acts in the affairs of the district. As pointed out, each county uniting in the district bears its share of the expense of the district according to a rate ascertained by the directors and levied by the supervisors upon the property in the county. This rate, obviously, is based upon the amount of expense incurred by the directors. Should the directors operate the district at a profit, each county is entitled to share in the profit, or surplus as it is called. . . . In all district matters the county acts through its Board of Supervisors, and it is to the Board of Supervisors of his county that each director is held responsible by the terms of the Act." (55 Cal.App.2d 147, 152.)

In view of the foregoing, it is still my opinion that each director representing the City and County of San Francisco on the District Board has a duty to vote on any matter coming before said Board in accordance with the officially established policy of the City and County.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



June 28, 1973

Mr. Joseph E. Tinney  
Assessor  
101 City Hall  
San Francisco, California 94102

Attention: Mr. George W. Loftus  
Director of Assessment Services

Subject: Emanuel Baptist Church  
2919 - 23rd Street, San Francisco  
File No. 15-73-3. Vol. 27, Block  
4207, Lot 34

Dear Mr. Tinney:

You have requested my opinion as to the legal propriety of a cancellation of taxes requested by the Emanuel Baptist Church. Your letter indicates that said church is requesting cancellation of property taxes for the tax years 1966-1967 and 1967-1968 on property acquired by said church on May 23, 1966.

From the record provided, it appears that said church requested an exemption in regard to the above tax years on February 3, 1973.

Because the Emanuel Baptist Church acquired the property in question after the lien date in 1966 and prior to the commencement of the 1966-1967 tax year, but failed to apply for exemption until February 3, 1973, Revenue and Taxation Code Section 271(a) (3) and (b) allows an 85% cancellation of taxes and penalties for that portion of said property which qualifies for the welfare exemption. Section 271(c) limits the 15% penalty for late filing to \$250.00.

You will note that the above applies only to cancellation of taxes. As to refund of taxes paid, the three-year statute of limitations set forth in Revenue and Taxation Code Section 5097 applies and bars the claim of the Emanuel Baptist Church. Samarkand of Santa Barbara, Inc. v. County of Santa Barbara (1963), 216 Cal.App.2d 341, 31 Cal.Rptr. 151. However,





Mr. Joseph E. Tinney

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the Revenue and Taxation Code contains no limitation similar to Section 5097 in relation to cancellations. Samarkand, supra, 216 Cal.App.2d 341, at 361.

If you will investigate the Emanuel Baptist Church's claim and forward your findings as to the percentage of the premises utilized exclusively for church purposes together with the dollar amount of taxes to be cancelled, I would be most pleased to prepare an appropriate resolution for submission to the Board of Supervisors.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



July 6, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Election Campaign Contribution  
and Expenditure Control Ordinance;  
Possible Ex Post Facto Features  
Thereof

Dear Mr. Dolan:

This is in response to your letter of June 19, 1973, wherein you request that I review the above captioned ordinance and, assuming the legality thereof, render my opinion as to whether or not it could have an ex post facto feature.

An ex post facto law has been defined, in part, as one that makes an act, or omission, occurring before the passing of the law, and innocent before the passing of the law, criminal and subject to punishment. (In re Valenzuela, 275 Cal.App.2d 483.) Such laws are prohibited both by the Federal Constitution (Art. I, Sec. 9, cl. 3) and the State Constitution (Art. I, Sec. 16), (In re Valenzuela, supra.)

The ordinance herein imposes numerous new or additional duties upon candidates for elective offices of the City and County, upon campaign committees for such candidates or for ballot measures, upon campaign treasurers for such candidates or campaign committees, upon persons making contributions to such candidates or campaign committees, upon persons receiving contributions in behalf of such candidates or campaign committees, upon trustees of campaign trust accounts, upon persons furnishing goods or services to a candidate or to a campaign committee, and upon officers of the City and County charged with the duty of administration and enforcement of the ordinance. (Secs. 16.504 - 16.525.) Any willful and knowledgeable violation of any of the provisions of the ordinance is a misdemeanor (Sec. 16.526), and may also result in forfeiture of office (Sec. 16.527), or forfeiture of all or part of any illegal contribution (Secs. 16.519(f), 16.520 and 16.521).



Mr. Robert J. Dolan

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July 6, 1973

Assuming the legality of the ordinance as a whole, it is my opinion that any provision of the ordinance which would transform an otherwise innocent act or omission occurring before the effective date thereof into a criminal act and subject to punishment would be ex post facto and therefore unconstitutional. (In re Valenzuela, supra.) However, it has been held that the constitutional prohibitions against ex post facto laws only preclude the application of such laws to cases arising before the effective date thereof. (People v. Cannady, 8 Cal.3d 379; People v. Murphy, 8 Cal.3d 349.) Thus, any question of an ex post facto feature of the subject ordinance could be obviated by applying the penal provisions of said ordinance only to events occurring on or after the effective date thereof.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





July 10, 1973

Mr. Charles E. Countee  
Executive Director  
Model Cities Agency  
301 Second Street  
San Francisco, California 94107

Subject: Applicability of Field Act  
to Model Cities Funded Mission  
Child Care Centers

Dear Mr. Countee:

This letter is in response to your inquiry of June 19, 1973, regarding the applicability of the Field Act requirements to buildings used by the Mission Child Care program. In short, the building standards in the Field Act do not apply to other than public school buildings, thus they clearly do not apply to day care centers operated by a nonprofit private corporation which is what we understand the Mission Child Care Consortium to be. Since the Field Act applies only to public schools, as opposed to private schools, it is not necessary to consider whether a day care center could be construed to be a school within the meaning of the Act.

Although the Field Act does not apply to the day care centers operated by the Mission Child Care Consortium, there may be health and safety provisions in the City building code which do apply. This would have to be verified with the Department of Public Works, Bureau of Building Inspection.

This letter confirms the oral advice given Mr. James Marshall of your office by Judith Teichman of this office on January 18, 1973. It was our understanding at the time that a written reply was not needed.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



July 11, 1973

Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Legislation Making Redevelopment  
Property Subject to Zoning and Urban  
Design Restrictions; Jurisdiction of  
City to Impose Zoning Control on  
State-owned property

Dear Mr. Dolan:

This is in response to your request for an opinion on behalf of Supervisor Dianne Feinstein requesting legislation which would terminate an exemption of redevelopment-owned property and make such property subject to the provisions of the City Planning Code and Urban Design Plan restrictions. You further request as to what action could be taken by the City and County of San Francisco to impose local zoning control on property owned by the State of California. Your questions will be answered in the order presented.

The City Planning Code (Part II, Chapter II, San Francisco Municipal Code) was amended by the Board of Supervisors in 1972 to provide for height and bulk limit districts throughout the City and County of San Francisco. At the time this legislation was adopted by the Board of Supervisors, Section 250 was added to the City Planning Code establishing height and bulk districts. Subsection (f) provides as follows:

"(f) The requirements of height and bulk districts established by this Article 2.5 shall not apply to buildings and structures on sites for which a redeveloper had been formally selected by the Redevelopment Agency of the City prior to August 26, 1971, for development in a Redevelopment Project Area in accordance with an agreement that specifically committed the City to a height or bulk configuration not consistent



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with the provisions of this Article for height and bulk districts."

The above quoted section provides a limited exception to the operative language of Section 250 creating height and bulk districts to cases where contracts for the sale of Redevelopment Agency property had occurred prior to August 26, 1971. I have been informed by the Redevelopment Agency of San Francisco that certain contracts for the sale of property were consummated prior to the aforesaid date. The exception was to codify in the City Planning Code the general exception that the redevelopment plan controls over local zoning.

The Redevelopment Agency of San Francisco is a state agency functioning under state law to fulfill state purposes (see Fellom v. Redevelopment Agency (1958), 157 Cal.App.2d 243; Andrews v. City of San Bernardino (1959), 175 Cal.App.2d 459).

After the adoption of a redevelopment plan by the Board of Supervisors and receipt of the plan by the agency, the agency is vested with responsibility for carrying out the plan (§33372, Health and Saf. Code).

The applicable section of law, specifically Section 33220 of the Health and Safety Code, is quoted, in part, as follows:

"33220. Powers of public bodies. For the purpose of aiding and cooperating in the planning, undertaking, construction, or operation of redevelopment projects located within the area in which it is authorized to act, any public body, upon the terms and with or without consideration as it determines, may: . . .

"(d) Plan or replan, zone or rezone, any part of such area and make any legal exceptions from building regulations and ordinances.

"(e) Enter into agreements with the federal government, an agency, or any other public body respecting action to be taken pursuant to any of the powers granted by this part or any other law; such agreements may extend over any period, notwithstanding any law to the contrary."

Pursuant to the above quoted statute and former Section 33018 of the Health and Safety Code, the Board of Supervisors of the City and County of San Francisco and the Redevelopment Agency entered into several cooperation agreements with the same



Mr. Robert J. Dolan

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language as noted above.

The cooperation agreements between the City and the Agency all incorporated the following language:

"The City further agrees that, subject to applicable law and the policies and procedures established under its Charter and existing codes and regulations, it will aid and cooperate in the undertaking of the project by: . . .

"(e) Making the necessary changes in zoning use districts within the Project Area so as to conform to the land use provisions of the Redevelopment Plan."

This type of problem has been considered by the courts in California and the leading case on this subject is Housing Authority v. City of Los Angeles, 38 Cal.2d 853, where the city council of Los Angeles rescinded its approval of a low rent housing project after the Housing Authority had proceeded in much the same fashion as the local Redevelopment Agency in the instant case. The court, at page 868, supra, stated as follows:

"It is assumed that the rescission of prior action may appropriately be accomplished by a municipal legislative body where rights of third persons have not intervened. The application of this recognized principle is to matters of municipal concern. (McConoughey v. Jackson, 101 Cal. 265 [35 P. 863.]) Here the state law is controlling in a matter of state concern. Thereby the city is authorized to contract in respect to the granted powers, but it is also bound to compliance therewith accordingly. (Kleiber v. City and County of San Francisco, supra, 18 Cal.2d 718, 724-725.) As also shown in the Dockweiler case (Housing Authority v. Dockweiler, supra, 14 Cal. 2d at pp. 456-457), with citation of McNulty v. Owens, 138 S.C. 377 [199 S.E. 425] (see, also, Rutherford v. City of Great Falls, 107 Mont. 512 [86 P.2d 656, 661]), the cooperation agreement is not an unauthorized attempt by the city to bind itself as to the exercise of governmental functions. It is simply an authorized contract to cooperate in the performance of those functions and as such is valid. Thus control of city streets is a governmental function which the city without authority may not by contract prohibit or curtail. [Citations.] But as pointed out the city is authorized under the state law to cooperate by contract with the housing authority in the





Mr. Robert J. Dolan

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exercise of the granted power to close city streets, and in doing so is acting pursuant to the statute in a matter of state concern."

Further, at page 869, the court in the Housing Authority case, supra, stated as follows:

"In State ex rel. Great Falls Housing Authority v. City of Great Falls, 110 Mont. 318 [100 P.2d 915], mandate was sought directing the city to comply with its agreement to rezone areas and vacate or close streets. In issuing the writ the court said (100 P.2d at p. 921): 'The refusal of the city council . . . to comply with the requests of the Authority to vacate the streets and rezone the location was a useless act. The acts of the city council of a contractual nature cannot be repudiated by any subsequent council, whether the membership of the council be the same or not. When the council authorized the creation of the Great Falls Authority it assumed all the obligations involved essential to a perfected project.' In declaring (at p. 922) that under the housing act both the city and the housing authority were state agents to achieve the state objectives, the court distinguished municipal and state powers and action, and was careful to admonish that the opinion should not be construed to impair the local self-government or home rule powers of the city. There is no inconsistency or disharmony in the city's functioning pursuant to its fundamental law in respect to municipal functions and powers, and pursuant to the state law as to specific powers granted in matters of state concern." (Citations.)

In a more specific instance regarding the Golden Gateway Redevelopment Plan, other problems would arise.

Section 803(d)2 of the plan provides: "The maximum allowable height [in commercial areas] shall be 60 stories." The proposed ordinance would have the effect of altering the plan by lowering the height limit to 400 feet and thus amending the plan without following the procedures of the Community Redevelopment Law.

Moreover, the literal wording of the plan prescribes adherence to the Community Redevelopment Law. Section 1302 provides:



Mr. Robert J. Dolan

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"After approval of this Plan by the governing body of the locality as indicated in Section 903 hereof, the provisions of this Plan may be changed or modified only by formal written amendment duly approved and adopted by the governing body of the Agency: Provided, that if the Amendment in question involves any material or substantial change in any of the provisions of this Plan, such Amendment shall also be approved by the governing body of the locality. In no event shall the Plan be amended during the period in Section 1301 above, in any manner which will adversely affect any land in the Area whose owners and successors in interest are obligated to devote such land to the uses specified in this Plan, except with the written consent of the then owner of such land. In addition to the foregoing provisions of this Section 1302, all provisions, if any, of State law respecting changes, modifications or amendments of redevelopment plans shall be complied with."

Thus, even if the Community Redevelopment Law did not otherwise govern, it would seem that in enacting the ordinance that is the plan, the City bound itself to observe the Community Redevelopment Law in acting upon any ordinance that may have the effect of changing the plan.

Article I, Section 10 of the Federal Constitution prohibits the enactment of laws by a state that impair the obligations of contracts. It has been held that a municipal ordinance constitutes a "state law" within the meaning of Article I, Section 10. In Northern Pacific Railway Co. v. Minnesota ex rel. Duluth, 208 U.S. 583, 28 S.Ct. 341 (1908), the Northern Pacific Railway and the City of Duluth entered a contract pursuant to which the City constructed a viaduct and agreed to maintain it for 15 years. Within such period, the City passed an ordinance requiring the railroad to repair the viaduct at its own expense. The Supreme Court held:

"[that] it is no longer open to question that municipal legislation passed under supposed legislative authority from the state is within the prohibition of the Federal Constitution and void if it impairs the obligation of contracts."



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"[that] legislation which deprives one of the benefits of the contract or adds new duties or obligations thereto, necessarily impairs the obligations of the contract."

See also Davis & Farnum Manufacturing Co. v. Los Angeles, 189 U.S. 207, 23 S.Ct. 498 (1903); Mercantile Trust & Deposit Co. v. Columbus, 203 U.S. 311, 27 S.Ct. 83 (1906). In two cases involving the City of Los Angeles, it was at least assumed by the deciding courts that zoning ordinances of that city constituted state action in violation of Article 1, Section 10. Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278, 33 S.Ct. 312 (1913); Wilkman v. Banks, 124 Cal.App.2d 451, 269 P.2d 33 (1954).

Lockhart v. City of Bakersfield, 123 Cal.App.2d 728, 267 P.2d 728, 267 P.2d 371 (1954), presented a situation with aspects similar to the instant case. In Lockhart, the City had entered into a cooperation agreement pursuant to which it was to rezone the property that was the subject of the agreement in such manners 'as are reasonable for the development and protection of the project.' The City thereafter zoned the area to accord with the Authority's recommendation. Contemporaneously, the City's authority to enact the zoning ordinance was challenged and a referendum was submitted to the voters in accordance with the City Charter. The question was whether the City's action was ineffective until approved by referendum pursuant to Charter provisions, or whether it was immune from referendum because undertaken pursuant to state law. Citing Housing Authority v. Los Angeles, supra, the court held that the City was obligated to zone as required by the cooperation agreement because it was acting as an administrative arm of the state; local referendum proceedings were, therefore, inapplicable.

For the reasons expressed above, it is clear that the City, having exercised its authority under the Community Redevelopment Law and having enacted an ordinance approving the Golden Gateway Redevelopment Project prescribing certain conditions and triggering the reliance of third parties, has no discretion to abrogate the provisions of the Redevelopment plan through local procedures; i.e., amending zoning ordinances to eliminate the section provided for in Section 250(f) of the City Planning Code.

In response to the second question posed by your request for an opinion as to what specific action the Board of Supervisors could take to impose local zoning control on property owned by the State of California, you are advised that the State has a sovereign immunity from local zoning ordinances and it could only be made subject to such regulation by an amendment to the





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Constitution or by the Legislature consenting to such regulation. Thus, in the case of Hall v. City of Taft, 47 Cal.2d 177, the Supreme Court of the State of California pointed out with reference to the application of such local regulations to school districts at page 181 - 183 as follows:

"School districts are agencies of the state for the local operation of the state school system. [Citations.] The beneficial ownership of property of the public schools is in the state. . . . While a large degree of autonomy is granted to school districts by the Legislature, we are referred to no statute or constitutional provision which, as far as the question here involved is concerned, expressly makes school buildings or their construction any more amenable to regulation by a municipal corporation than structures which are built and maintained by the state generally for its use. When it engages in such sovereign activities as the construction and maintenance of its buildings, as differentiated from enacting laws for the conduct of the public at large, it is not subject to local regulations unless the Constitution says it is or the Legislature has consented to such regulation. Section 11 of Article XI of the state Constitution, supra, should not be considered as conferring such powers on local government agencies." Also, see County of Los Angeles v. City of Los Angeles, 212 Cal.App.2d 160; Akins v. County of Sonoma, 67 Cal.2d 185; Government Code, Section 53090."

For the reasons expressed above, the legislation which you requested cannot be furnished and is not attached to this letter.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney















